

Advertisement to the Reader.

SUPPLEMENT

TO

**The REPLY in Vindication of the
Kindred of the late Mr. T.**

WITH

Refutations occasionally, of whatever deserves Notice,
in two Pieces since published ;

The one entitled, *An Answer to so much of a certain
Treatise as relates to the Law.*

The other, absolutely *An Answer to the Reply.*

Advertisement to the Reader.

TO make good the Title on the other Side, I have been forc'd to follow the *Opponent* in some very bye, uncouth Ways, and shew the Fault and Fallacy of a great deal of Cavilling Argumentation, upon Matters very plain and easy in themselves, but which he has perplext, by substituting abstract empty Notions, and affecting an improper and equivocal Expression. In this Sort of Work, very unpleasing to the Writer, and likely to be as little agreeable to the Reader, the *Refutations* subjoined to the first *Section* are chiefly taken up. The Rest is altogether in the Ordinary Track of Thought and Discourse, and abundantly sufficient to convince any one, not quite blinded with Prejudice, of the Justice of the Claim of the Relations of Mr. *T*—. Wherefore if the Reader seeks only to be appriz'd of the Merits of the Cause, and cares not to waste his Attention upon the Examination of confused Ideas, and captious ways of Speaking, he may pass over the said *First Refutations*, and content himself to cast an Eye upon the Rest.

C O N T E N T S.

SECT. I.

NULLITY of the Plea of Renunciation; from the Law of Nature and Nations, and Dictates of Common Sense.

SECT. II.

Nullity of the same Plea; from the Common Law of *England*.

SECT. III.

Concerning the Roman Civil Law.

SECT. IV.

Nullity of the same Plea; from the express Words, and whole Intent of the Constitutions of *S*.

SECT. V.

Nullity of the same; from the Doctrine of the most celebrated *S* Divines: together with the History of the Origin of this extraordinary Plea.

SECT. VI.

Shewing that neither *G* nor *S* have or had any well-grounded Claim to the Estate of *T*, from the Law of *England* Ancient or Modern: With an APPENDIX concerning the Claim of the Nepotism of *G* to the whole.

Refutations throughout of the two Answers.

At the End the quoted Pieces, and Texts of Authors, in their Original Languages.

A S U P.



A
SUPPLEMENT
TO THE
REPLY.

The CASE.

T dies Intestate. His next surviving Kinsman is his Cozen German *G*, who forty Years before had been solemnly profest in a religious House called *S*. Several Nephews and Neices of *G*, Children of a Brother and Sister of *G*, are likewise Survivors : as also several others in equal Degree to *T*, being Children of other Cozen Germans of *T*.

Quere, To whom belongs the Personal Estate left by *T* ?

PREFACE.

 Had begun this Supplement by signifying somewhat at large, that I conceived most People were very well satisfied of the Justice of my Cause, by what had already appeared in its Defence ; and that I had even had hopes, *S* itself would conform to the general Judgment, offer back what it had drove the Relations to grant it, meerly to redeem themselves from an unjust Vexation, [a Vexation not a little prejudicial to them, but which might also have brought on more extended Inconveniences] and in some publick Manner disclaim for the Future, not only all Right of Inheritance as still subsisting in those Profest among *S*, but also all Devolution of such Right to their Body, by Means of a pretended palliating Transfer made before Profession. To this I added, that hearing nevertheless the said *S*, was far from entering into such just and reasonable Sentiments, and having since the Publication of the *Reply*, partly remark'd myself, partly been advertised by others of several Things serving very much to confirm and illustrate the Truth, which had not been touched upon before, I had acquiesced once more to take Pen in Hand, and go through another Course of the disagreeable Labour of writing what I saw was displeasing to, and deeply resented by some, whom I had otherwise a Value for, and to whom I wished extreamly well.

But when I cast my Eye upon my *Opponent's* last Performance, I perceived he began it with a Preamble much of the same Kind; and as I look upon the Character of my Cause to be very different from that of his, truly I was ashamed to have lit upon Thoughts and Words to begin with, very much alike to those which he had so strangely abused and misapplied. Wherefore, that Truth, Justice, and Sincerity may not appear in any thing of a Livery put on by their Contraries, I have cast off from my Preface most of the Reflexions I had before placed in it, and throwing them aside till some perhaps, shall naturally rise again and offer themselves from the Truths to be made out afterwards, I shall proceed directly to declare the Method which will be observed in the following Treatise.

It must be observed, and cannot but be remember'd by any one who has read the *Reply*, that the Dispute, as to Right, and the consequent Obligations of Conscience, which, it is presumed, neither Party would knowingly and deliberately go against, has been reduced, by common Agreement, to this single Query, whether or no any Right of Succession to the personal Estate of *T*, has accrued to *S*, by a certain general Renunciation made by *G*, in Favour of *S*, above forty Years ago, of all Goods and Rights then belonging, or that should ever belong to *G*. The *Opponent* maintains the Affirmative, and has said the best he could for it in certain Tracts published under the Title of *Answers to the Advocate*. This latter, who declares for the Negative, made a *Reply*, in which chiefly, he thinks, and many others think with him, that he has fully proved the Doctrine quite opposite to that of the *Opponent*, solved all the Arguments brought for that Side, and all Objections against his own.

Not long after that the *Reply* appeared, some Gentleman or Gentlemen of the Law undertook also to defend the Cause of *S* by Arguments drawn from the Law of *England*, in a Piece entitled, *An Answer to so much, &c.*

Now as to what concerns the Controversy, as it has been managed betwixt the *Opponent* and *Advocate*, the Latter has remarkt that the Matter will still bear to be farther cleared, and that the Proofs which he has already insisted on, may be strengthened and rendered more striking, and new ones added no less convincing; by the Performance of which, the Weakness and Vanity of the Assertions, Arguments, and Objections of the other, will appear still more manifest. Lately also has appeared, an *Answer of the Opponent* to the *Advocate's* last *Reply*; by which the Former, as by every new Piece he has hitherto done, furnishes in Abundance new Opportunities of shewing the Badness of his Cause. As to the other Way of treating the Question, by the common Law of *England*, the learned Gentlemen on each Side, and some others whom I have consulted on the Case, have so fully laid down the Authorities to be attended to, that I think I may now venture to speak also to that Part, and persuade myself, that I can plainly shew, that this Law, considered either in its present or ancient State, so far from favouring the Pretensions of *S*, entirely overthrows them.

Such being the present State of the Controversy, I shall divide this Treatise into several *Sections*, no less than seven.

The First, Shewing the Nullity of the Plea of Renunciation, from the Law of Nature and Nations, or rather the Dictates of Common Sense.

Second, Nullity of the same Plea, from the common Law of *England*, looking upon as invalid and rejecting all Transfer of meer Right.

Third, Concerning the *Roman Civil Law*.

Fourth, Nullity of the same, from the express Words and whole Intent of the Constitutions of *S*.

Fifth, Nullity again from the Doctrine of the most celebrated *S* Divines; together with the History of the Origin of this extraordinary Plea.

Sixth, Shewing that neither *G*, nor *S*, have or had any well-grounded Claim to the Estate in Question, from the common Law of *England*, whether it be consider'd as it was before the Change of Religion, or as it now stands; with an Appendix concerning the Claim of the Nepotism of *G* to the whole.

Seventh, A Refutation of several Things alledged by the *Opponent* in his late Answer, relating to the present Controversy, but not touching the Substance and Merits of the Cause. As to the Allegations, which so touch the Cause in either of the Answers, I shall add Refutations of them at the End of the Sections, according as they concern the Subject handled in each Section.

For Distinction Sake, I will call the new Answer of the *Opponent*, *Answer Third*, and that of the Gentlemen of the Law, *Answer L*. And when any Text of a Foreign Author, which some may be curious to see and examin in its original Language, or other Piece shall be too long to be inserted in the Body of the Work, it shall be found at the End, and referred to by Numerical Letters.

SECTION

SECTION I.

Demonstrating the Nullity of the Plea of Renunciation, from the Law of Nature and Nations, or rather the Dictates of common Sense. Nullity of the same declared long ago by Bartolus and Baldus, from the like Principles, and lately by a Resolution of the Doctors of the College of Sorbonne upon the present Case.

THE Argument taken from the most obvious Principles for distinguishing Right and Wrong, mentioned in the Title, seems to have been sufficiently laid open in the *Reply*, to convince any one of the Truth, who has Eyes to see, and induce him to own it if he has Candour and Sincerity. All therefore that can be of further Use is to reduce it to a Form still more exact and luminous, that so it may be fitted even for the most imperfectly sighted, and confound any others, who are either quite blinded with Passion, or so overway'd, that they will not acknowledge, nor act by what they plainly perceive, and endeavour by Cavils and vain Objections to hinder others from seeing, and acknowledging the same. To put Things therefore in the clearest Light, I will demonstrate the Two following Positions.

- I. G was incapable of succeeding *ab Intestato* to the Personal Estate of T, in Virtue of any Right which G had before his Profession.
- II. Any one else to whom G shall be supposed to have transferred the Right which he had before Profession, was equally incapable of succeeding, in Virtue of the transferr'd Right.

Demonstration of the first Position.

All the Right, which G had before his Profession, to succeed to the Personal Estate of T, at least that Right which concerns the Plea in Question, was only Conditional, and of succeeding *ab Intestato*, upon these Conditions, amongst others, being put; that at the Death of T, G were living, and able, in true Justice so to succeed: which Conditions consequently, according to common Speech, are said to have been respected as necessary, by the Conditional Right.

But G, after his Profession, was never able in Justice, to succeed *ab Intestato*, in Virtue of such a Conditional Right. Therefore, he was never after able so to succeed in Virtue of any Right had before.

The Major is not denied, as to the Condition of G's being living, and 'tis as evident that the Condition of his Ability was equally necessary. For 'tis as much a Contradiction in Law, for a Man to succeed *ab Intestato* without an Ability in Law so to succeed, as it is a Contradiction in Nature for a Man to succeed who is deprived of Life. I go on therefore to prove the Minor.

Nobody can succeed by Virtue of a Conditional Right, nor can the same turn into an Absolute one, unless all the necessary Conditions be put which this Right respects. But the abovementioned necessary Conditions, respected by the Right of G before his Profession, were never all put, *viz.* that of being legally able, at the Death of T, to succeed *ab Intestato*; which is granted by my Antagonists.

Therefore the *Minor* of the first Syllogism is no less certain than the *Major*; and due Form having been observed, the Conclusion, which is the first Position, is true and demonstrated.

This Demonstration I have given, not that there was any Doubt about the Proposition itself, since S acknowledges that all who profess among them either had no hereditary Right before, or lose it then, and are consequently incapable of inheriting in Virtue of any, either absolute or conditional; but because it is manifest from the former Syllogisms, that the second Position is equally demonstrable.

Demonstration of the second Position.

No Transferree can succeed in Virtue of a transferred conditional Right, unless all the necessary Conditions be put which this Right respects.

But all the necessary Conditions which the supposed transferred Right of G respected, were never put. Therefore no Transferree could succeed by Virtue of the said Right.

The Major is Evident, and I prove the Minor.

The Conditions which a transferred Right respects in the Transferee are the very same, neither more nor less, than those which it respected in the Transferrer. For if the Conditions were not the same, it would not be one same transferred Right, which only changes Subjects; for Example, if the Condition of Ability in *G* was changed into Ability in *S*, it would be a quite different Right which never was in *G*. But the Conditions which the Right respected in the Transferrer were never all put, as has been proved in the former Argument. Therefore, neither those which it respected in the Transferee. Consequently all the Propositions in the first Syllogism of this second Argument are true, and its Conclusion, which is the second Position, is good and demonstrated.

Notwithstanding that the Inutility of the quondam conditional Right of *G* to *T*'s Personal Estate, and the utter Impossibility of its having been of any Benefit to him at the Death of *T*, or to any body else, by means of Transfer, has been thus put in the clearest Light, from the most evident and obvious Principles of Reason; it may be yet agreeable to some, to see what learned Men, who have been noted for their great Study and Skill in that Branch of Science which regards Right and Justice, have thought on the same Subject. I will therefore here produce two or three of the most considerable Authorities of this Kind amongst Ancients and Moderns.

Of the Ancients, two venerable Sages of the Law shall be my Men; *Bartolus* and *Baldus*, who lived many Years ago in the 14th Century, when the Study of this Science very much flourished in Europe, and who have been ever since extremely respected both by Divines and Lawyers.

The Words I shall quote out of *Bartolus* are in *Legem finalem, C. de Paëtis*. (I.) "Lastly, says he, I ask whether an Inheritance to which I may succeed *ab Intestato* may be said to be due to me in Hope. This seems to be the Meaning of the Law at those Words, *Spes alienæ Hereditatis ad eos devolvendæ*, in the Beginning.——But the contrary appears, and is the Truth, and I prove it.——For that is said to be owing to us in Hope which depends not on the meer Will of another, but on some future Event. Now, whether or no an Inheritance shall come *ab Intestato*, depends on the meer Will of the Person, who is to die, because he can make a Will and institute an Heir. And this is not said to be a Hope——The same appears from this other Consideration; because a Man may dispose of that which belongs to him in Hope, as well as that which belongs to him in Fact. But of such an Inheritance, or Hope of it, nobody can dispose. Therefore——Note also by the Way, that such a Hope is not Juridical, but the vain Hope of a Man, which is not to be attended to; which be sure always keep in Mind."

The Words of *Baldus* are taken from his Comment on the same Law. (II.) "There are two Sorts of Hope; the one depends upon the meer Will of another Person, and cannot be brought into Contract; the other depends upon some future Event, and not the Will of another, and is properly called Hope, and may be brought into Contract——That properly is called Hope, which has a certain Cause in Being: But that which has no such Cause in Being, as the Hope of succeeding to a Man living, is not properly called Hope. And this makes to the present Question, concerning a Man obliging and making Cession of all the Goods which he either has or hopes to have, which is to be understood, of a Hope caused by something past, not of a Hope to be caused by something future."

Upon these Passages it may be remark'd, that both the famous Lawyers exclude Expectancies of Estates *ab Intestato* from the Name and Character of Hope as is it taken in the Civil Law, which the Opponent so positively affirms no Lawyer ever denied, and which, poor as it is, he is so very zealous to obtain for them: that both deny such a vain improperly call'd Hope can be disposed of, or brought into Contract: that both bring for this Assertion that very Reason, which I assigned in the Reply, why, in no Construction of our English Law, such Expectancies were capable of being given or granted, to wit, that they depended on the meer Will of another; and lastly, that *Baldus* declares expressly, that such Expectancies are no ways comprehended in a General Cession or Renunciation of Goods had and hoped for.

Amongst Modern Doctors, I know none of greater Repute, and whose Judgment will be more willingly hearkened to by most People, than that of the University of Paris and College of Sorbonne. For which Reason I had these consulted upon the present Case, and their Opinion, Point-Blank against the Pretensions of *S* and this Plea of Renunciation, here follows. Besides the known Abilities of the Subscribers, who are most of them publick Professors of Sorbonne, they are also noted for being such good Friends to *S*, and so conformable to their Sentiments upon the Questions of the Times, that no Exception can be made to them on that Account.

The Case is proposed as if T and G had been Brothers, and the Relations had been all Children or Descendants of a third Brother, or a Sister; which alters nothing in the Difficulty to be resolved as to S.

CASE. (III)

“ *Sempronius*, a Batchelor, being about to embrace a religious Life, makes a voluntary Oblation, Donation, or Cession, of all his Goods and Rights present and future, in favour of a certain House or Religious Society which he afterwards enters, and there consecrates himself to God, by solemn Vows of Religion. About forty Years after this Donation, a Brother of *Sempronius* call'd *Titius*, one who has a very considerable Personal Estate, dies without Children and Intestate: to whose Succession, consequently, *Sempronius*, if he had remained in the World, would have been called, on Account of being nearest of Kin to *Titius*. But since *Sempronius*, by reason of his solemn Vows, whereby he abdicated himself from the World and all worldly Things, and the Society into which he entered, by reason of its Constitutions, are incapable of the Right of Succession; it seems that this Inheritance belongs to the immediate, or perhaps the remote Nephews and Neices of *Titius*, being Children or Grandchildren to his other Brothers or Sisters.”

ANSWER.

“ The present Case having been read, and as the Importance of the Cause requires, maturely weigh'd and discussed, the *Sorbonne Doctors* are of Opinion, that the Donation made by *Sempronius*, in favour of the Society into which he enter'd, is void, falls to nothing, and is of no Force. The peremptory Reason for which Decision, as being founded in the Law of Nations, is given by *Cabassutius* in his *Theory and Practice of the Canon Law*, Lib. 5. C. 3. N. 18. 'Tis certain that two Things are required for any one to give. First, it is necessary that he have the Dominion or Property of the Thing to be given. 2dly, That he have the free Administration of the same. For Administration without Dominion is not enough: Since Tutors, Guardians, Trustees, cannot give the Things they Administer, because they have not the Property. Nor is Dominion sufficient without Administration: For Prodigals, Minors, and Pupils, who are under Tutorship, altho' they have the Dominion and Property of their Estates, and are to have the Benefit of them, cannot dispose of those Things, of which they have not the Administration. Now *Sempronius* cannot be said to have had either the Dominion or the Administration of the Moveables of his Brother, whilst yet living. On the other Hand, long before his Brother's Death, he had despoil'd himself, by his solemn Vow of Poverty, of all Power of Succession. It remains therefore, that being destitute of all Right to the said Goods, he could not transmit them to others: According to this 79th of the Rules of the Canon Law, no body can transfer more Right to another than what he has himself. 'Tis concluded therefore by the Doctors consulted, that nothing hinders the Kindred of the deceased *Titius* from entering upon his Succession, to which they are called by the Law of Nations. Given in *Sorbonne*, this 23d of August 1744.

De bacq. Machet, L'Advocat, De Lorme.

It may be observed, that the chief Principle, which grounds the Decision, is this, that G, neither before nor after his Profession, could give the Personal Estate. Whence immediately appears, that S could be entitled to nothing upon G's having promised to give, if ever he got. Oh! but says S, tho' G could never give the Estate, yet before his Profession, he could give his Conditional Right to it, respecting the Condition that he should sometime take, or be able to take it. Very well: and the Doctors by not having taken Notice of this wretched Subterfuge, plainly shew that their Notions were entirely uncorrupt and just. For they could not imagine such Cavillers were to be found, as to pretend a substantial Difference betwixt these two Forms of Transaction: *I promise to give if I ever get, and I now give my conditional Right respecting the Condition, that I sometime get, or be able and entitled to get.*——But I have chanc'd to meet with such Cavillers, follow'd them in the bye Way, which they have pleased to take, considered their Principles under that Form of Conception and Expression which they think most serviceable for their Purpose, and plainly shewn by the two foregoing Demonstrations, that their Weakness and Inconclusiveness are as apparent this Way as any other.

I cannot but here take Notice, that it was insinuated to me from the same Place, from which came the Decision, that they did not think the Brethren of S, in those Parts, would ever have made so extravagant a Claim, as has been put up here: and yet the Laws, there, exclude them no more from the Benefit of Donations of Moveables, than they are excluded any where else.

Refutation

Refutation of Answers.

Answer 3d. Above half of this third Answer, viz. ²¹ Pages of the 28, and all that the Opponent pretends to say touching the Substance of the Cause, is chiefly, and in a manner solely taken up, in attacking the Truths set forth in the foregoing Section. They, on their Side have been so clearly made out, that 'tis most certain nothing can be opposed against them but Ignorance, false Reasoning and Cavil. This most People may think was Reason enough, why I should have entirely neglected, and not troubled myself with making any Reply; nevertheless, that my Adversary may not think himself quite despised, and to prevent or put a Stop to his misleading perhaps some others, I have resolved not to decline the Pains of running over what he has alledged.

In my Refutation of him on the Matter of this Section, I shall follow the Order of his Objections. But before I speak to his First, I must take Notice that, in order to prove that G, forty Years before the Death of T, could not make a Donation of T's personal Estate, either present or future, which is a fundamental Point in this Controversy, I had observed in the Reply, that suitably to the Law of England, by which we are to be judged in this Case, and in Relation to the Matter now in Dispute, three sorts of Right might be distinguished; two which regarded Property, the other respecting future Contingencies, depending on the uncertain good Will and Pleasure of another Person. The first of the two former I remark'd to be the Right, which every Body has to that which is commonly called his own, his House or Land, which he may deal with and dispose of as he pleases; which is called a Property in Possession, or for the present. The Second I said, was a certain Right in the like Things, when by the Grant and Deed of some Proprietor, they would be thus at our Disposal, if the present, and perhaps one other or more succeeding Possessors should fail, and we outlive them, which is called by our Lawyers a Property in Reversion, Remainder, or for the Future. These two in just Analogy, as I take it, to the English Language, and conformably to the common Ways of speaking, I distinguished by the short Appellations of *Right to*, and *Right in a Thing*; in which after having defined the Meaning of my Terms, I did no more than what every Writer is allowed to do, according as he thinks is most convenient for treating his Subject. Both of them I acknowledged, carried with them, according to the Estimation of our English Law, a Property which was oftentimes attended by Possession, or Quasi-possession, which are generally denoted by the Word *Investment*: Whence nothing hindered but they might be transferred, and their Objects be given and granted and all remain to the Grantee, whatever became of the Grantor. To the third Sort which I added, as being to have frequent Occasion of speaking of one of the Sort, I gave the Name, as the properest that occurred, of *Rights towards a Thing* when indeed we had no Property therein, but were only entitled to it under certain Conditions; from which Right I maintained no Benefit could be had without all the Conditions being put, and should any entirely fail, the Right itself would be extinguished. Against this Distinction, which threatned very much the clearing up the Matter in Dispute, the Author begins with drawing out his cavilling Learning, citing Authorities, right and wrong, quite from the Purpose, and illustrating all with his own gross Mistakes.

Ib. page 3, Numb. 2. First, says he the Advocate is out in the Notion he gives of the different Significations in which the Word *Right* is taken. Secondly, he does not assign the true Difference betwixt what he calls a *Right in a Thing*, and a *Right towards a Thing*.

Refutation. As to the First, the Advocate is not at all out, in the Notions he gives; for every one who has read any Thing, or heard any Talk in English, about the Law of our Country must know, that here Men are said to have a Right, implying Property and making a Thing grantable, to Estates in present Possession, and a *Right* likewise implying Property, and Power of Grant in Estates in Reversion or Remainder; Thirdly, some sort of Right, though very diminutive, and scarce deserving the Name, to Expectancies, or Things which will only be his, upon some Contingencies falling out. 'Tis notorious; that the Word *Right* has all these Significations. These it was to my Purpose to take Notice of, and of no others.

Ib. p. 4. N. 3. He goes about to shew, that *Canonists* and *Civilians* understand otherwise *Jus in re* and *Jus ad rem*, a *Right in* and a *Right to*; and upon this Occasion up come *Lessius*, *Layman*, and *Pickler*. The last of the three, one indeed not often heard of; whom yet the Opponent, p. 16. of *first Remarks*, shews to be a very great Man, because *John Baptist Obrist*, Attorney and Solicitor in the Imperial Court of *Wetzlaer*, has thought fit to approve and recommend his Work. We should have been glad however, some Person of Credit had been produced to vouch for *John Obrist*.

Refut. This might have been something to the Purpose, if the Advocate had been speaking with Relation to the Canon or Civil Law, but speaking only with Respect to the Law of England, and having

having laid down those Rights, whose Objects according to this last, are capable of being given and granted, which are of two and only two Sorts, and they remarkably different; it was proper to take Notice of the Difference, and no less proper, in Conformity to the common Use of *English Words*, to denote them by the Appellations of *Rights to* and *in*.

Again, if I had undertaken to give a compleat Division of *Right*, he might reasonably enough have excepted, that my Operation was inaccurate and imperfect. But I can assure him, that in such Case I should have proceeded quite otherwise. I should in the first Place, according to the Language of *Civilians*, have divided *Right* into *absolute* and *conditional*: then subdivided *absolute* into *Jus in re*, implying Dominion or Property, and *Jus ad rem*, arising from an Obligation in some other to deliver over something I was entitled to: Whence I had also an Action for recovering the same in Justice. Further, according to our *English Jurisprudence* I should have also subdivided *Jus in re*, into that which regards *present Enjoyment*, and that of *Reversion* and *Remainder*; to which Class likewise belong *Annuities*. Afterwards I might have subdivided *conditional Right*, with *Bartolus*, into that, the Condition of which depended on the *meer Will of another*, and that of whose Condition there was *reasonable and juridical Hope*, so that the Object might be said *debitum spe quamvis non re, due in Hope tho' not in Fact*; or with *Baldus*, into that the Event of whose Condition might be *hoped for from the present State of Things*, and that whose Condition could only be *expected from some future uncertain Contingency*, as the Inheritance of an Intestate, by his taking the Fancy to die without a Will. Or if any one likes better, he may make the most general Members of the Division to be *Jus in re*, and *Jus ad rem*; and then subdivide both into *absolute* and *conditional*. To which may be added, that the transferring or giving the *Conditional Jus in re*, is no more in Effect than a Promise absolutely to give, if the Condition be put, and in this Respect all Transfer of *conditional Right* may be said reduceable to the imparting a *conditional Jus ad rem*: Inasmuch as the transferr'd Right amounts to no more than an Obligation in the Transferrer, to transfer absolutely, if the Condition be put, what he conditionally promised.

But the Opponent may depend upon it, I should never have confounded *absolute* and properly called *Jus ad rem*, in the civil Law Acceptation, that is, what in our Law Language comes under the Denomination of *Chose in Action*, or Right thereto, with a Right of Expectancy and meerly conditional. Much less should I have said, that a *Right of such Expectancy is as truly a Right to any Thing, as any Right whatsoever we can have to a Thing that is not yet ours*; that is, to apply this Saying to our Subject, G, fifty Years before the Death of T, and when T was not worth the fiftieth Part of the personal Estate which he dy'd possessed of, had as much a Right to T's future Estate of that Kind, as he had to any Thing at the same Time, which was not absolutely his own; Money for Example, for which he had a Note or Bond.

I have not so ill an Opinion of any of his three forementioned Heroes, as to suspect, that if he had ever read or understood any one of them, he would have talked so extravagantly out of the Way. And yet this is the Man who is perpetually laying out, what *all all* Canonists and Civilians agree in; as if he was the best acquainted with them in the World, and his chief Pleasure and Employment had been to read and study them. But the most favourable Construction I can put upon all this, is, that the Gentleman, tho' very accomplish'd in all other Respects, could never bring himself to mind so much as his School-Treatise *de Jure & Justitia*. For how else can one account for his crying out as he does in the same Page, against distinguishing Expectancies from Rights *ad rem*, which give an Action, as a Thing unheard of, and a meer Fiction of the Advocate? Moreover, he must have forgot, as no Wonder when Notions are so confused and inconsistent, his own declared Sentiment, p. 22. of his *second Remarks*, where he scruples to give the Name of Right, to one much more deserving than that in Question, to wit, to that of a Fisherman to his expected Prey. For, says he, this Right, or rather *Expectance of Right*; and in another Place, which I cannot now turn to, he signifies that the Right in Question ought rather to be called a *Right to a Right*, that is scarce one Degree more than a natural Power and Capacity.

After having so notably dispatched his first Point, he proceeds to his Second, which is to shew, that I do not assign the true Difference betwixt *Rights in*, according to my Description, [which he saies ought to have been called *Rights to*] and those others which I had called *Rights towards* a Thing, such as the Main of our Dispute was to be about, and the Objects of which I maintained to be incapable of present Donation or Transfer. My Error in assigning the Difference, he goes about to prove by two Arguments, the Characters of which, in a Word, are, that the first consists in a perpetual Blunder, and the Second is a Piece of unintelligible Gibberish.

B

For

For his first Argument runs thus: The Right of an Heir at Law, to what he may inherit, which is *Jus ad rem*, a Right to a Thing, is liable to as many, and even more Contingencies, than a Right of Expectancy.——Now unfortunately, this Right of an Heir at Law, as such, and on whom an Estate is not otherwise entail'd or settled, is a meer Right of Expectancy, and far from being according to the civil Law *Jus ad rem*. For if the last was true, the Heir might have a present Action for the Estate, and turn out the Proprietor. For Right of Action is ever consequent to *Jus ad rem*, and is even its distinctive Character; though the Opponent confounding all Things in his Definitions in the Beginning of P. 4. makes it the Character of *Jus in re*, which is properly a legal, though not always, as when unattended with Possession, a natural Power of Disposal.

As to the Contingencies to which the Right of an Heir at Law is subject, he might have taken particular Notice, that it depended entirely on the Will of another, who might grant or devise the Estate as he pleas'd, whether the Heir at Law should ever have any Thing of the Estate or no. Whence it follows, that Heirship at Law to Estates that may fall, at least here in England, is a meer Right of Expectancy, and of the lowest Kind; and therefore the Contingencies annex'd to it are so far from destroying the Notion that I gave of my Right towards, that they furnish a clear Instance of such Conditions, as render the Object of a Right not capable of being given or granted. For every Body knows, that a meer Heir at Law in the Life of his Ancestor or Kinsman, cannot give, grant, or any Ways engage the Estate, which he expects to inherit.

His second Argument he sets forth in a very solemn magisterial Declaration of the Differences of Right, *intrinsical* and *extrinsical*, Terms not at all explain'd by him, and, as here apply'd, for any Thing I can see, not explainable. Wherefore, as there is no Likelihood any Meaning can be found to them, it would be vain and superfluous to hunt after one. 'Tis enough for my Purpose, that the Right towards, or Right of Expectancy, which I am to treat of, has, by respecting as a Condition, the meer Will of another, a Character plainly distinguishing it from all *Jus in re*, or even *Jus ad rem*, in any proper Signification given to these Terms, and rendering it such, that its Object cannot be transferred. If the Evidence of the Thing and common Sense of Mankind, be not enough to satisfy the Opponent, but he must see moreover some learned Names, I could direct him to proper Places in *Lessius*; but he may see the Like in any Author who treats of Donation, and of the Rights on which Actions are founded.

After that the Opponent has done so much towards confounding all Things, he proceeds, Numb. 5. to the Refutation of five Assertions, which he will have to be Assertions of the Advocate, and to contain the Grounds of the Arguments whereon he lays his chief Strefs. The First of these he makes Numb. 1. to be that, *The Right G might have had at the Time of his Renunciation to the personal Estate of T being no more than a meer Expectance, could not be transferred to another.*

Refut. I have not remark'd that I have any where, as yet absolutely, asserted this Proposition, as the Argument I chiefly insisted on against his Plea did not require it: nor do any of my Texts which he brings N. 1. to prove it to be mine, import any such Thing. But as this is but one of the small Faults in his Way of Writing, I will not much quarrel with him about it. And now I tell him, that if I did not speak affirmatively before, my Argument then, which I still stick to, not requiring it, at present upon more ample Consideration and Information I so speak and maintain, not indeed, that the Transfer implies a Contradiction; but that not only by the civil Law such an Expectancy cannot be transferred, but what is much more, that by the common Law of England, of immemorial Standing, not Rights much more Substantial, in a Word, neither such as Civilians call *Jus ad rem*, (excepting some particular Cases provided for by special Statutes) nor even *Jus in re*, without some Sort of Possession or Investment, can be transferred from one to another, but that all such Rights can only pass to, and be continued in Heirs, Executors, and Administrators. Whence as the Rights to Goods which are in England, must be determined by its Laws, an invincible Argument will be drawn against the Plea of S, which, as I do not insist upon in this Section, and it will make the Subject of the next, I say no more of at present.

I tell him Secondly, that what he produces by way of Refutation of the said Assertion, is a meer Heap of Mistakes and Errors.

First, he says that Canonists and Civilians subdivide *Jus ad rem*, into *Spes probabilis* & *improbabilis*, such as is accompanied with a great or little Hope of Success——I cannot pretend to answer for what every Lawyer, Canon or Civil may have said. But I am very apt to think, not one good Lawyer can be produced, who has distinguished *Jus ad rem* by Respect to any such Hopes. If he had looked in his *Lessius* l. 2. cap. 2. dub. 2. where he gives the Division of Right, he would not have found the least Intimation of this Distinction. According to him, *Jus ad rem* is defined *quod non tribuit actionem in rem, sed personam*, Right to a Thing is what gives an Action not upon a Thing but

but on a Person. And for Example, he brings the Rights that accrue from Stipulation, Donation, Emption, and other Contracts before Tradition. *Vinnius in Instituta*, a sort of a Classical Author amongst Civilians, in *Lib. i. Tit. 2. §. 12.* divides Right into Real, being Dominion, or some other Right in a Thing, and Personal, which in a Word, says he, may be reduc'd to Obligation, and Credit. The Opponent on his Side, quotes *Sanchez*, whom I have not now by me, but whom, in all Appearance, he has cited as little fairly upon this Occasion, as on another, which will be seen in Sect. 5.

2. His Civilians and Canonists when they treat of the abovementioned *Lex finalis*, again tell him, that when they talk of *probable* and *improbable Hope*, they do not mean a Right or Hope more or less grounded, but such as is approved and allowed of, or disapproved and disallowed of by the Laws—and yet *Bartolus* and *Baldus* upon this same Law, as is plain in the Words quoted from them, expressly declare that some Hopes, or Contingencies, metaphysically possible, namely that which is the Subject of our Dispute, the Hope of succeeding to an Intestate, are repelled from being brought into Contract, not merely by reason of a positive Law, but from the Unreasonableness of the Suppositions themselves; as if the Opponent should pretend to bargain with a Man to give him at a certain Price so many dozen of Larks, which he, the Opponent might catch, if the Skies fell.

3. He is still very unhappy in his Civil Law Quotations, tho' he has endeavoured to reform them. The Law he insists upon is, *L. Nam hoc Modo, 11. ff. de Hereditate*, which is still wrong quoted, for it should be 18. *ff.* But what is worse, this Law is upon another Subject, and speaks of a quite different thing from what the Gentleman is talking of. For it is not concerning an Inheritance that is to fall, but an Inheritance actually fallen; which a Man sells, inasmuch as it is his, really believing it to be so; and this Hope, the Law says, is Vendible, nor is the Seller obliged to make good the Title.—Nevertheless it may be here remark'd, to our Purpose, upon this and the two or three Laws precedent and subsequent, to which this relates, that Vendition of this *spes Hereditatis*, or Transfer of an Inheritance for the Present under Condition, is look'd upon to be the same Thing, only differently expressed, as a Covenant or Contract whereby one sells and engages to give it up, if he has an actual Right to it. For *ib. L. Quodsi*, The Sale of the said *spes Hereditatis* is described by this Transaction, if the Seller had any Right, the Inheritance was sold, *Si quid (in hereditate) Juris esset Venditoris, venire*. In like manner the Transfer of an Inheritance for the future, under Condition, amounts to the very same Thing, as a Covenant to give it, if in Time to come it shall belong to the Transferrer.—Perhaps also the Opponent may see in this Example the Absurdity of making his transferred conditional Right to be of Benefit, after that one of its necessary Conditions has quite failed. *Seius* sells to *Titius* his Right to an Inheritance if it be actually his. The Law says, *Seius* shall not indemnify *Titius*, tho' the Inheritance should prove not to belong to *Seius*. But the Opponent says, That notwithstanding, he has a very good Way of indemnifying *Titius*; for the Right of *Seius* was a true conditional one, even a *Jus ad Rem*, and saleable, and actually sold and transferred to *Titius*: and therefore, however the Case may be with *Seius*, whoever be the true Heir, *Titius* has the said Right, and may and will make something of it.

After that the Opponent has thus attack'd the first Assertion, in a vain, erroneous, self-destroying Manner: Vain, because it was none of mine: Erroneous, because of the many Errors and Blunders he has advanc'd in impugning it: Self-destroying, because he only furnishes new Arguments to defeat his own Cause: He then proceeds to Assertion II. which is truly mine, *viz. Supposing such Right was at all transferable, it respected as a necessary Condition, that, at the Death of T, G should be capable of taking the Personal Estate of T by hereditary Succession*. 'Tis in this Proposition, he says, that the Chief Hopes of the Advocate subsist. And this is so far true, that the Advocate has hitherto insisted on it, as furnishing his chief Proof, in the argumentative, complicate Way, against the Opponent's Shifts and Pretences to rational Argument; and still insists, that joined to other obvious and uncontested Truths, it creates a mathematical Evidence, that neither G, nor S, ever had the least Shadow of Right to T's Personal Estate.

Ib. N. 7. Against this Assertion the Opponent objects, that it has been frequently advanc'd but never proved.

Refut. A man must be an intrepid Disputant, and able to outface the most glaring Evidence of Truth to make such an Objection. For if that might be supposed as a Principle which the Opponent lays down as the chief Ground of his actual Plea, that to which the Arguments he has brought, (since his having dropt the Plea first put up in the *Deduction*) have chiefly referred, to the very Time the Reply was writ; that, to which this his last Piece, as defending the same Arguments, refers also in ninety nine Parts of a Hundred, of what it has touching the Merits of the Cause; it has been proved over and over

again, that the Right of *G*, before his Profession, respected as a necessary Condition, that *G*, at the Death of *T*, should be capable of hereditary Succession. For, that which he lays down in his *Case stated relatively to S*, which I called his *Discussion*, as the Ground of his Plea, is the Right which *G* had of succeeding to *T*, under the Contingency of his proving next of Kin to *T*, at the Time of *T*'s Death, and consequently Heir at Law, or *ab Intestato*. *Discuss. p. 1.* Which conditional Heirship at Law, or *ab Intestato*, he alledges was transferred to *S* by *G*'s General Renunciation in favour of *S*. All the Arguments he makes use of in this *Discussion* from one End to t'other, all his Discourse both there and where he again touches the same Subject in his *Second Answer, p. 19*, tend to prove that *S*, in Virtue of this Hereditary Right transferr'd to it by *G*, (which *S*, tho' not *G*, was capable of at the Death of *T*;) justly may, as it now does, claim the Personal Estate of *T*: all that I have hitherto considered of this last Piece, and all in a manner that yet remains, touching the Merits of the Cause, tends to the same Point, that *S*, in Virtue of such a transferr'd Right might succeed to and inherit any Estate which *G* would have been Heir to if he had lived in the World.—Now 'tis evident, as has been often urged, that this conditional, hereditary Right of *G*, respected the Condition of *G*'s being alive at the Death of *T*, and not only alive but not attainted, not out-law'd, not otherwise disabled from taking by Inheritance: Since 'tis as impossible, as has been observed, in the first Syllogism of the first Demonstration in this Section, and equivalently, in many Places of the *Reply*, that *G* should take by Inheritance, if he were disabled by Law, as so take if naturally dead. And this is what the Opponent himself very plainly confesses in the few Lines which he has in his *Second Answer, p. 19*, concerning the Nature of this chief Plea. For after he had said that *G*, before his Profession, could dispose of a Right he had of succeeding to *T*'s Personal Estate, under, that is, (in other Words) respecting several Contingencies, he subjoins, that supposing the Estate was to fall in *G*'s Life-time, his true Right, from the Beginning, was under these several Contingencies, *if he were not under Attainder, or a Profest Religious*. Therefore from the Concessions of the Opponent, and the very Foundations laid by him, of his Cause, the Second Assertion has been abundantly proved.

As the foregoing Answer of the Opponent has been shewn to be extravagant, so what he brings to give a Colour to it, is little less. First he says, *ib.* that if *G* could have only promised to give the Object of his Right, if ever it was his, then indeed such a Promise would respect as a necessary Condition, that *G* at the Death of *T*, should be capable of taking the Personal Estate of *T*.

Refut. Besides what has been proved in the first Demonstration, of *G*'s conditional Right respecting the Condition of his being able to take, I leave it with the common Sense of Mankind, to which I appeal'd upon this Article, in the Body of the Section, and since, *p. 9*, Whether there be any Difference of Moment, between *G*'s promising to give if the Thing came to be his, and *G*'s transferring his Right respecting the Condition that he ever took, or was able to take.

ib. Secondly, he says, if these two Transactions were equivalent, the Condition respected would be Ability to take the Estate not by hereditary Succession, as the Advocate wrongfully calls it, but as Administrator to his Intestate Kinsman, in Virtue of the Statute of Distributions.

Refut. Now one sees very well what made him say the second Assertion was never proved. No: It has not yet been expressly proved against this new Plea of the Gentlemen of the Law, here borrowed by the Opponent; according to which, the Right of *S* is deduced from one in *G* still subsisting in him at the Death of *T*, (which the Opponent has disown'd fifty Times) by which, tho' ever so much profest, he was intitled to be Administrator under the Statute of Distributions. But, against his own second Plea of conditional, hereditary Right transferred, it has been abundantly proved, as has been just now seen. Thus we find that as he can no longer defend his Second, he is for leaping to a Third, and to proceed in his ordinary Way of Puzzle and Confusion, without giving the least Notice. I shall not here go about to examin the Arguments, upon which Answer *L* pretends to set up this Plea. That will be more conveniently done under Section VI. But 'tis certain none of their Arguments prove, that the present way of taking the Estates of Intestates may not in a very proper Sense be called a hereditary Succession *ab Intestato*. For altho' Religious should have had some Right in former Times to demand Administration, (which yet they certainly never had) of the Personal Estates of their Intestate next a-Kin; 'tis undoubted that now, since the Statute of Distributions, these Estates of Intestates are not taken in *Autre droit* by Way of Administration, in behalf either of living or dead; but whatever be still the Form and Style of the Writs of Spiritual Courts, and how necessary soever they may be for obtaining Possession, Personality is taken under the said Statute, as a Property of the Taker, a Property ty'd to Proximity of Blood, and so that the taking Kindred represent the Person of the Deceased. Now what is a Total Inheritance by Law, according to all Lawyers, but a Right of Property arising from Proximity, and by Order of Law, to all Goods left by a Deceased, and by which the

the Heir stands in his stead and represents his Person? A Right therefore to Part of his Goods given by Law on account of Proximity of Blood, and so as to represent his Person with respect to one Part, is a partial Inheritance *ab Intestato*. So English Lawyers commonly expound the taking of Intestates Estates under the Statute of Distributions, formed upon the Model of the Roman Civil Law. So the Opponent, and the whole Family of S have constantly understood it in this Controversy; and therefore must confess, that the Right of which they pretend to avail themselves, as formerly transferr'd, respected the Condition of G's being capable of hereditary Succession, of which nevertheless G and all profest Fathers, were and are most certainly incapable, since they are declared incapable of all sort of hereditary Succession: *Omnis Successionis hereditariæ incapaces. Greg. xiii. Bull. Ascendente.* The Advocate therefore was no ways in the Wrong, but had full Reason to say, that the Condition of Ability to take, respected by G's conditional Right, was Ability to take by hereditary Succession. And should some Scruple, tho' unreasonable, be made at calling Succession under the Statute of Distributions hereditary, 'tis still as to ~~the~~ a Property coming to the Taker, *ab Intestato*, which is equally repugnant to the Profession and Constitutions of S, and the unanimous Declaration of all its Divines.

Ib. 3dly, He thus argues: Such a Transfer could not respect as a necessary Condition, that G himself should be capable of taking the Personal Estate, because by the very Transfer of his Right he made himself incapable of taking in virtue of a Right he had transferr'd to another; but it only respected as a necessary Condition that G should be next of Kin to T, when T died Intestate.

Refut. I should be in no manner of Pain, if the Opponent could make out that This famous Transfer imply'd a Contradiction. But to do this he must use some other Argument, than the ill-form'd Cavil which he brings here, and elsewhere, which makes mostly against, and by which he puzzles himself, whilst he is seeking to puzzle others. To shew this, and where lies the Deception, I begin with what he says last, G's Right only respected as a necessary Condition, that G should be next of Kin, when T died Intestate. If so; as there is no Inconvenience in supposing G to take, whilst a Condition not necessary for taking is absent, we may suppose him taking and at the same Time unable to take, by reason of some legal Impediment, as Attainder, or religious Profession. This is a plain Contradiction. We must therefore look upon it as certain, that one necessary Condition, which G's conditional Right of taking, respected, was G's future Ability to take; and if, upon Pretence that after Transfer, the Transferrer would never be able to take, no Ability could be respected by the transferred Right; it would follow, that all Transfer of such Right is impossible; which is directly against his Plea. How then should he have gone about to ward off this fatal Blow to his own System? First, He should have reflected, that 'tis quite accidental to Rights, whether or no they be transferred; whence they may be consider'd antecedently to, and abstracting from all Transfer, and as so conceived be transferred. On the other Side, legal Taking essentially requires civil Life and Ability; and therefore a Right to take for the Present must be actually attended with these, and a Right to take for the Future and Conditionally must respect the same in Futurity and under Condition. Nay a conditional Right to a Thing, is said on some Occasions to respect as a Condition not only a Capacity of Taking, but also the actual Taking and Getting; as when a Fisherman sells beforehand the Fish he shall take. And what more ordinary than to say, if ever I get such a Thing, I now give it you, for then *nunc pro tunc*. Nevertheless this is but an improperly called Gift, and a meer Shadow of a true one, which requires Property and Possession; and the conditional one amounts in Effect to no more than a Promise to give if I get, as was observed Page 9. For which Reason not only the Act of Transfer does not destroy the Capacity in the Transferrer, as it destroys not Civil Life; but does not even prevent his ever having the Property of the Object respected, and only brings an Obligation upon him to give it up, if the Conditions be put. Wherefore, to speak School-Language, which I presume the Opponent may understand, the Transfer excludes not the Conditions now mention'd in *Actu*, either *signato*, or *exercito*.

The Opponent having thus crowded into less than half a Page the Absurdities remark'd upon in the four preceding Refutations, hastens away to what he calls my III^d Argument and Assertion. The Occasion of his Haste is very apparent. For having nothing reasonable to oppose to the second Assertion on which I laid my greatest Stress, and which of itself manifestly destroys his Plea; he was unwilling to look, or that any one else should look at it any longer, and was in Hopes to keep it out of his own and every body's Sight, by bringing other Matters upon the Carpet, which went not so safely to the Point in Question and might afford him Matter of Wrangle.

The Assertion which N. 8. he gives out for mine, and sets about to impugn, is this. G's civil Death, by his Profession, is in the Eye of the Law equivalent to a natural Death, as to all civil Effects: And upon Occasion of this Assertion he makes a prolix Dissertation, touching upon several Things nothing at all to the Purpose, which therefore it will be enough slightly to run over, shewing in a Word, their Falsity or Impertinency.

Refut.

7^{thly}. This Assertion singly and crudely taken is not mine. If instead of the last Words, *as to all civil Effects*, he had put, *as to Privation of all civil Rights in G*, it would have represented my Sense, and been proper. So it is sufficiently evident from the Meaning which both canon and civil Lawyers give to *civil Death*. Thus the Romans said of their Slaves, and other *Capite Deminuti*, that they were civilly dead, because deprived of all civil Right, all Right to any Thing as their own Property and for their own private Benefit. Thus our Lawyers use the same Metaphor in regard of Outlaws and Attainted, as their Predecessors did also in regard of all Religious Profest, and as the R. Cath. Canonists generally do now.

2^{dly}. I never pretended in this Assertion so amended to contradict the Opponent, because I supposed, and still suppose, that he willingly admits the profest Members of S, to be so dead. Indeed from hence may be formed an Assertion like the Second, and which equally overthrows the Plea of Transfer of the Conditional Right. For as that Right was before said to respect as a necessary Condition, the future legal Ability of G at the Death of T, so it may be equally said to have thus respected his future civil Life at the same Time.

3^{dly}. Here again the Opponent brings in his *Intrinsic* and *Extrinsic*, as little to the Purpose as before. For if there be a real Incapacity, what matters it to our Purpose, whether it be from the Act and Choice of a Man, or Ordinance of Law?—Besides, the Opponent will scarce deny, I am sure few Divines will, that the Extinction of all civil Rights in the private Persons of solemnly Profest Religious of any sort, is imply'd in their Profession, and in the Sense and Meaning of all Constitutions approved for the same, which is what calls he here an *intrinsic* Incapacity. Whence, as S does not pretend to any Privilege of succeeding, whenever their Religious might have succeeded, if they had not been civilly dead, S can as little succeed on Account of their private Religious, as these can for themselves, who must be own'd, even according to his own Definition, to be *intrinsically* incapable thereof.

4^{thly}. P. 8. To prove that a civil Death has not the Consequences of a natural one, he brings the Example of Peter having an Annuity for the natural Life of John, which is not lost by John's becoming Religious. But does this shew any civil Right in John after his Profession? No: all the civil Right is in Peter. The same holds in his other like Example of John a Religious, having made over his Annuity. For by our Laws, an Annuity is a vested Interest and allowed to be transferrable as well as a Reversion or Remainder, and after Transfer no civil Right to the yearly Payment remains in the Transferrer. All that can be drawn from hence, which is nothing at all to the Purpose, is, that sometimes the civil Rights of others, may be dependent on the natural Acts, and Accidents of a Religious; and that when absolute, they are quite independent of his civil Life or Death, tho' they may have come originally from him.

5^{thly}. He says, and dilates thereupon, that the Right of Expectancy in S, does not at all interfere with G's civil Death.——But all this is only *Crambe repetita*, *Cabbage over again*, and an obstinate Denial of what is as clear as the Day, that G's conditional Right of inheriting or succeeding to the Personal Estate of T as G's Property, for so long as it was in Being in G, or on whomsoever it was transferred, respected G's future Capacity and civil Right at the Death of T; which Capacity and Right, having been cut off and rendered impossible long before, by G's Profession, the said conditional Right could never have any Effect, and must have perished at the same Time.

6^{thly}. The Opponent's General Notion of the Use in Law of such Metaphors and Similies, as that of civil Death, is very faulty. These Similies are not only good, when something is otherwise proved to be conformable to Law, but as they are grounded upon a sufficient Induction, they also indicate what is or is not conformable. He might have seen this Matter very well express'd by Mr. B——, p. 14. of the 3^d Copy: *Every one that knows any Thing of the Spirit and Genius of our Law*, (and the same in this Particular, is that of the Civil and Canon) *must know, that when they make Use of Fictions of this Kind, they adhere to them always, so as to carry the Parity and Resemblance into all Cases, and to make it hold throughout, unless where some solid Distinction stands in the Way.*

7^{thly}. What he asserts afterwards, that civil Death can have no Consequences, where no Benefit accrues to a Religious, tho' true as to some Cases, when there is Question of a Religious taking in *Autre droit*, is far from being universally so, and is notoriously False in our Case, when the Right supposed to be transferred is Conditional, and the Condition respected is an Ability, a civil Right to be personally Benefited in him who is become Religious. For such was G's Right of Succession before his Profession, *viz.* If G, at the Death of T, was able to succeed *ab Intestato*, and have the Personal Benefit of T's Estate—Nothing can be weaker than the Inference he forms, from G's Right respecting his natural, that therefore it respected not his civil Life. For it respected both Lives as Conditions equally necessary. For

G's Right was no other than to succeed, if G was naturally living and otherwise able to inherit, for which he must be also living Civilly.—And this equally shews that the Rule of Law which he brings makes plainly against him. *Qui in jus succedit alterius, eo jure, quo ille, uti debet.* He that succeeds to the Right of another must make use and avail himself of that Right, and no other, than what the other had: Which in G was to inherit of T, if G, not S, or any body else, was naturally living and otherwise able. This way of reasoning the Opponent sometimes calls a bewildering the Reader with Obscurity and Fallacy of Argument. But 'tis quite otherwise, and only a putting him into the beaten Road of good Sense, enlighten'd with the Sun-shine of Evidence, and hindering him from being stopt in his Course by the Opponent's confus'd, inconsistent Allegations. No Perplexity can be hence raised but to such as him, who are obstinately bent upon opposing the most obvious Dictates of common Sense.

A IVth Assertion which he gives me, N. 9. is, *That the civil Death of G, by which he is incapable to acquire for himself, makes him also incapable of acquiring for another.*

Refut. This Assertion is none of mine. He produces no Words of mine for it; and I am sure he can produce none. I make no Exception to these Ways of Expression, a Religious sometimes may acquire, take, and inherit for his Monastery as the Slave might for his Master. Even the strict Mendicity of S. Francis does not forbid his Disciples, as he tells them in his Testament, to take the Price of an honest and becoming Labour, *Accipere pretium Laboris, qui ad Honestatem pertinet*, but only the setting their Hearts thereupon. I only remarkt that *Acquiring, Taking, and Inheriting* have different Significations, when said absolutely of any one, and when said to be for another. And upon this Subject I am ready to subscribe to what the Opponent says, p. 14. excepting some incongruous Expressions which I have left out and supply'd with Dots, *When therefore it is said, that a Monk, tho' he cannot acquire and take for himself, he can take for his Monastery, it is not meant that he exercises any Act of appropriating first to himself and then transferring to his Monastery. Such Appropriating would be against his Vow of Poverty. But it is meant, that he is the Means through which his Monastery acquires Which immediately, without any active Concurrence of the Monk, acquires the Property of such Inheritance or Legacy.* I am willing also to suppose, that the Authors which he learnedly quotes for this most undoubted Explication, *Hostiensis, Joannes Andreas, Abbas, Benedictus, Parisius*, really deliver it.

I must observe yet, that in some Countries, there are certain Ways in which private Religious are no more able to take for their Monasteries than for themselves; upon which Account they are sometimes absolutely said to be unable to take either for themselves or others. Thus in *France*, a Legacy left to a Religious, without Mention of it's being for his Monastery, is not Good: And so says Mr. B-----, it appears to have been formerly in *England*: As also that no private Religious without mention of his Sovereign, could recover any thing for Debt or Damages. All which is abundantly confirm'd, 31st *Henry VIII. C. 13.* which lays no new Restraint on, tho' it gives no Indulgence to, non-deraigned and non-departing Religious, but leaves them in the same Condition they were in before by the common Law: of whom the Statute says, *that they shall not be received, admitted, or deemed able in Law to demand, challenge, receive or take any Thing or Things, by Reason, or for any former Title, Right, Interest or Purpose; before the said several Deraignments or Departings out of their Religion.* Nevertheless for such Things and Ways, in which Religious may be Means for their Monasteries acquiring, as when on Occasion of their Relations of Kindred, and a Privilege in some Countries granted to Monasteries, these represent their Religious and inherit what they might have inherited, or when the Religious, who are esteemed only as Instruments of their Sovereigns and Community, earn by their Labour, or when again something is given or left to them considered only as Hands belonging to a religious Body, into which the Gift or Legacy is put for the same: In all these and the like Ways, which come under the General Term in *Autre droit*, I most readily allow, according to the laudable Customs of each Country, that they may be said to take for their Monasteries.

Thus we see that the Opponent needed not to have look'd for Reasons against the 4th Assertion, since he had no Manner of Ground for affirming it to be mine. If nevertheless he had a mind to shew his Skill in Law both *English* and *Roman*, at least he should have brought true Instances of both Kinds, as he might have brought several, if he had known any thing of either. But of the two Instances which he alledges, one for each kind of Law, he is out in both.

First, He says, it is certain that if a Person be civilly dead by Attainder, an Estate falling to him, (that is, which would have come to him if he had not been Attainted) does not go to the Heirs *ab Intestate*, but to the King. Now on the contrary, it is certain that it does not go to the King, unless the Attainted had in it a vested Interest, as by Remainder, but will go to the Heirs of the Person from whom it falls, as if the Attainted were naturally dead; and may go to any Heirs of the Attainted, unless in a Case of Corruption of Blood, and that these Heirs are his Descendants. The

The Civil Law says as little of what he pretends, as our Common. For the whole Import of the Law which he quotes, *Cum pater ff. de Legatis, 2.* is only that an Heir in Trust for his Children, or any one of them at his Death, whom he pleaseth to chuse, and afterwards himself incurring civil Death by Deportation, did not therefore lose his Power of chusing who his Trust should go to. Not a Word of Confiscation. This also is the Meaning of the Note of *Gothofredus, alias Denys Godefroy* a French Jurisconsult of the last Century, which Note he quotes, and very learnedly calls *Glossa* without any Addition; an Appellation given to certain Notes put in the Margin of the Text either of the canon or civil Law, above three hundred Years ago. The other Law, *Statius ff. de jure Fisci*, adds only a Decree that the Heir in Substitution or Remainder, being one determinate Person, is not to take the Inheritance, upon the Deportation of the Heir in Possession, and the Fisk must have it during the Life of the Deported. Whence the Demand of the substituted Heir, was in the mean while rejected: *Repulsus est interim a Petitione*: which is very conformable to our English Way of proceeding in like Cases of Forfeiture. I am very apt to think that these Misrepresentations of the English and Roman Law have been imagined with a View to insinuate, that according to both, an inheritable Estate not vested in a Person dying civilly, and falling after his civil Death, did not go as if the Person was dead naturally; which is certainly false, excepting in the Case abovementioned of Corruption of Blood. Nevertheless as I am little in Pain about his Views, I should as little have troubled myself about these his Errors, much less have spent so many Words upon them; only that it was proper to make the Reader sensible how little he is to be trusted, when he says *this is certain* in common, this in civil Law; this is acknowledged by all Civilians and Canonists, that by almost all; he who appears not to have read any, or almost any, and to have understood none.——If he had wanted to express the Disposition of the civil Law, how Goods not under a fiduciary Substitution were to go, when the Person to whom they should naturally come was civilly dead, he might have found it in the Law, *Sunt quidam ff. de Pœnis*, which declares, that if a Legacy be left to one after he has been condemned to the Mines, and is therefore said to suffer the *Maxima Capitis Deminutio*, whereby both Liberty and Right of Citizen is lost, it goes not to the Emperor, but is as if nothing had been writ of it in the Will, or the Legatee had been naturally dead. *Sunt quidam servi Pœnæ, ut sunt in Metallum dati, et si quid eis Testamento datum fuerit pro non scriptis est.* Which again I conceive to be agreeable to our English Law as to Forfeitures upon Attainder.

The Vth Assertion which the Opponent brings, N. 10, as the Ground of my Plea, is, that *The Right which G could Transfer is extinct by his Profession.*

Refut. This in my Style would rather have been express'd thus: *If G could have transferred his Right of Inheritance to S, it must have been extinguish'd by G's Profession.* And thus the Proposition is rather a Part of my Conclusion, than a Medium or Argument to prove it: the whole Medium hitherto urg'd in the reasoning Way, and from the Principles of Law and common Sense being compriz'd in this Assertion, that G's conditional Right of inheriting of T, on whomsoever transferred, respected a Capacity in G at the Death of T to inherit: Which Capacity of G, was not, nor could be at that Time, nor ever after his Profession. Whence nothing could ever be had from it, and at the Time of the Profession it was extinguish'd.

Ob. But says the Opponent; the Transferrer changing his Condition, could never alter the Right; as if Peter becoming a profest Religious had sold a Rent to John during Peter's Life.

Refut. When a Right, tho' respecting the natural Life of Peter, is yet esteem'd in Law as absolute and a vested Property, as is Peter's Right to an Annuity, he may very well transfer it to John, and as long as Peter lives, no Alteration of Peter's Condition shall affect the Right of John. But the Right in G was not of Property, not so much as a Right of Action, but merely Conditional, and G's Profession utterly destroyed one necessary Condition, viz. Peter's Capacity of Taking.

Ob. The Right of inheriting of T subsisted in S before G's Profession, and therefore it might subsist afterwards.

Refut. Let the antecedent Proposition pass for the Present, the Consequence is visibly false; because as appears by the 2d Demonstration in the beginning of the Section, the Right in S the Transferee could no more subsist after G's Profession, than it could have subsisted in G after the same. But the Opponent will not deny that it could not have subsisted in G, since Profession wash'd away all civil Rights subsisting in him till that Time.

Thus we have run through the first Part of the Opponent's Work; in which he pretends to ruin the Foundations on which I built, and to establish at the same Time some others for his own Building. But as has been seen, of the five Assertions which he assigns for the Grounds I have chose to build upon,

there

there is only one, that is properly and without Correction mine, and some not at all: And only one which I lay as a Foundation, and what he says under the five Heads of these Assertions, is such a Tissue, or rather confused Medley of Mistakes and Errors, that it can never hurt the Cause I plead for, nor be of Help to his, but has only given a farther Opportunity of manifesting the Justice of the one, and the Weakness and Injustice of the other.

Ib. Part 2d. The second and remaining Part of his Work he employs in rejoining to some Answers given in my *Reply* to several of his former Objections. After what has been said in the Body of this Section, and the foregoing Refutations, and what shall be said in the following Sections, I believe very short Notes will be sufficient to shew the Vanity of what this Part contains. If, indeed, any one has a Mind to be help'd in this, by what he shall find here, he must be at the Trouble to cast an Eye at the same Time on that Place in his *Answer* which I refute. For I thought it quite too much constantly to state over again every one of his Objections, my former Answers to which are here confirm'd. However, the Substance of the Objection, and of the proper Answer will be expressed: But even what I thus do, especially under this first Section, seems rather a superfluous Trouble: So that I shall not wonder, if others shall not think it worth their while to make the Comparison I have here recommended.

Ib. Part 2. The Opponent complains heavily, that I imposed on him, and on every Body else, when I said it was his declared Opinion, and quoted for it p. 4. of his Discussion, that G could not inherit for S.

Refut. Let any one consider these Words of the Constitutions of S, which the Opponent quotes, or refers to p. 1 and 4, of the Discussion, and which he there signifies he will stand by, *Not only the private Profest, and form'd Coadjutors, are not capable of hereditary Succession, but not even the Houses, Churches, or Colleges by reason of them.* Let him afterwards judge, if I had not Reason to think and say, that I duly expressed the Opponent's Sentiments. For since he owns in what has been cited above, out of his p. 14. of this 3d Answer, that what is signified by a private Religious inheriting for his Order, imports that a private Religious is the Means by which his Order comes to inherit what the Religious himself might have inherited, if he lived in the World; and owns also, that S Order cannot thus inherit by Reason or Means of its Religious: How can he say that I misrepresent his Thoughts in affirming, that an S Profest cannot inherit for his Order? — Besides, he knows and does not disown, that the Reason for which private Religious of most other Institutes are said to inherit for their Orders, and these to represent them for Inheritance is, That they have the Benefit of certain Laws, either the *Justinian*, or as he, and indeed several other Divines will have it, a Canon of the Council of *Trent*, which are supposed to have enacted in Favour of religious Orders (not excepted) that they shall inherit what their Religious might have inherited. Now, he has acknowledged over and over again, that S has renounced to the Benefit of all such Laws; and he knows that in order, at the same time to have it lose nothing by this seeming Self-denial, some of S have set up of late this Plea of a Transfer of Right before Profession, by which not G any ways inherits, but S. And accordingly I am confident, that he cannot produce one S Divine of Note, who says, that the Profest Members of S can inherit for S in the Sense we are here talking of; and of which there was a Question in the Case, and, perhaps, in any Sense whatsoever. So *Lessius*, Lib. 2. Cap. 41. N. 88. says expressly, *That in Orders which have not Right of Succession, amongst which he had before said was S, private Religious, tho' they may acquire several other Ways for their Order, cannot so acquire by succeeding ab intestato; they cannot therefore inherit ab intestato for S; because by Profession, all such Right is lost, and in a Manner extinguished, tho' not quite irrecoverably, because they may possibly remove into another Order, not so constrained. Nam per professionem, omne tale jus amittitur, & quodam modo extinguitur.* As to Legacies, they are of a quite different Nature from hereditary Successions by Course of Law. The Right to the latter, can only arise from the Civil Capacity of a natural Heir, or some such indulging Law as the above mentioned *Justinian*: The Right to the other comes from the good Will of the Testator, and the natural Capacity of the nominal Legatee to be serviceable in *autre droit*; and if a Religious, to be a Hand into which any thing may be charitably put (if some Law does not forbid it) for the Use and Property of his Monastery.

It must therefore be a strange Inadvertence in the Opponent to treat as an Imposition upon him and the Reader, that he should be said to think that a private S Religious could not inherit for his Body. There are other Considerations also of Civility and Decency, which tho' he pretends always to have had regard to, he has certainly very much laid aside on this Occasion, when he breaks out into these Expressions, *What must the Reader think of the Advocate's Sincerity when he finds no Words of*

mine can be turn'd to such Sense? And again: He is drove to such poor Shifts as to impose on the unwary Reader, and boldly to mark a Page, in which are Words implying the contrary; which by the bye he pretends to prove by Words implying nothing contrary. For the Words he mentions are, *S Religious are incapable of inheriting for themselves in particulari*: But this is no ways contrary to their being incapable of inheriting for their Body. For they may be, and are equally incapable both of one and the other. But I will make no more Complaints of this Kind, tho' frequent Instances occur of his flying out into the like unbecoming Language; for which, when there is so little Occasion, as has been here given, or any where else, the consequent Hurt will be greater to him and his Cause, than me: And therefore, for all such Flowers of Speech he will be best left to the Justice of the Reader.

Moreover, to make for him the best Excuse I can, so at least as to bring him off from the Charge of Inadvertency, I believe he had his private Reason and mental Reservation, which he thought empowered him to say that a Profest of *S* might inherit for *S*: Because, if an Inheritance be left by Will to a Profest, he may, thought he, take it for *S*. Nevertheless, even this suffers Difficulty in the Doctrine of *S* Writers: For upon those Words of the *S* Constitutions, *No House shall be capable of succeeding by reason of a Profest Member*. Layman de Just. & Jure. L. 3. Tract. 5. C. 5. N. 3. says expressly. *And these Words must be understood of both Successions by Will and from Intestate: Because where the Law does not distinguish, neither must we distinguish. Et debent hæc verba intelligi de utraque successione quæ est ab intestato, & quæ ex testamento; quia ubi lex seu constitutio nihil distinguit, nec nos distinguere debemus.* But whatever may be said of this, our Dispute is only concerning Inheritance by Course of Law *ab intestato*, not by voluntary Institution or Devise. Whence the Opponent only furnishes a flagrant Instance of what I was just now remarking, his captious and equivocal Way of Writing.

Upon the Whole, the Case as stated in my first Paper, and afterwards in the Reply, since *G* was there only said to have been unable to inherit for *S*, by Course of Law, as *Kinsman to the Intestate T*, is plainly proved to be just and accurate; and as the bare Description of it gives an almost irresistible Conviction of the Justice of my Cause, I here again exhibit it.

CASE. From Reply, p. 12.

G is Kinsman to *T*, and if *T* should die without a Will, and also many other very uncertain Contingencies come to pass, *G* would be entitled to all or Part of the personal Estate of *T*. *G* renounces in Favour of *S*, to all Estates Real or Personal that shall afterwards come to *G*. *T*, forty Years after the Renunciation dies without a Will; and other favouring Contingencies fall out. But *G*, at and before the Death of *T*, by another Act made immediately after the Renunciation, and made with the Privity and Consent of *S*, was become avowedly, according to the Rules of true Justice, incapable to take or claim, for his own Use and Property, or for the Use and Property of any other Person or Body, even of *S*, as Kinsman to the Intestate *T*, any part of *T*'s personal Estate; which Incapacity continued afterwards the whole Life of *G*.

Query, Whether notwithstanding this Incapacity of *G*, *S*, by virtue of the Renunciation, be entitled to the Share of the personal Estate of *T*, which *G* might have been entitled to, if the said Incapacity had not supervened? And whether *S* may claim the said Share preferably to the next in Order of Kindred to *T*, if *G* be set aside?

Ib. p. 12. The Opponent is for maintaining, that what he had said from the Civil Law, about *separatæ hereditates*, and other things in *Hope* being capable of Transfer, made some thing to the Purpose.

Refut. Certainly not. For he was there arguing against me, who passed it to him, as I have still done in this Section, that not those Expectancies only, in which the Civil Law exemplifies, might be transferr'd, but even his own unjuridical Expectancy of an Intestate's Estate. Neither does the same make against Mr. *B*——, which he now runs to, and of which I shall take further Notice in another Place. What he adds, that I must grant the Transfer was valid, and subsisted from the Time of *G*'s Donation to the Time of his Profession, that is, for several Years, he himself must know to be far from certain; because he cannot be ignorant, that the Members of *S* are incapable of inheriting, not only from the Time of their Profession, but from the Time of their being form'd Coadjutors: And as I am informed, this Coadjutorship, generally speaking, follows the Renunciation very near; and I have particular Reason to think it was so with *G*.——He concludes with denying, that the Condi-
tion

tion of the Right never came to pass: Because G was next a kin to T, and living at the Death of T. But, for making a conditional Right profitable, Is it enough that one or two necessary Conditions are put, if one or more, no less necessary, be wanting?

P. 13. The *Lex finalis, C. de Pactis*, says the Opponent, does not make against me, because it relates to a particular Case.

Refut. I never said the Objection was such, as not to admit an Answer. But an Objection it is, for it speaks not only of the Case which gave occasion to it, but of all such like Bargains. *Omnes hujusmodi pactiones odiosæ sunt.* And again, generally, *In alienis rebus nihil licet fieri vel pacisci, contra domini voluntatem.* Nay, if the Words had been less general, any Lawyer will tell him, that a Law-decision for one Case makes Law for all other Cases that are alike. I do not yet pretend to say that in the Body of the Civil Law, any one particular Law can be so definitive and peremptory, as not to admit an Answer; because Civilians will sometimes answer, by setting it aside on account of others contrary, or giving any sort of Interpretation to reconcile them.

Ib. He pretends I mistake the Meaning of the Law *Ea vero, ff. pro Socio.*

Refut. The Law *Ea vero* admits of an universal Fellowship, not only as to Inheritances, but also as to any Thing which may be given to any of the contracting Parties, or *quâquâ ratione acquisitum.* Whether it be the same of an universal Cession, is another Question. But however this may be, 'tis certain in such a Fellowship nothing would be got either to the Company or to any Party, if when the Inheritance fell, especially one merely casual, the Party that were to inherit, proved unable so to acquire, which is directly our Case.

Ib. p. 13. and 14. He thinks unbecoming the Reflection I made upon his many false Quotations of the Civil Law; which was, that he seemed never to have read the Texts, which he made a Shew of quoting.

Refut. Such a Reflection is not at all out of its Place, when one has to do with a Man, who is continually talking of *all* Civilians, *all* Canonists, and yet seems to have been very little conversant with any. He here goes about to throw all the Fault upon his Printer. But can he thus excuse this other Quotation in his *Marginal Note to p. 24. of second Remarks*, which seems to have been added after the Sheet had been once work'd off, and therefore with due Deliberation, and a very much to be suspected Design of imposing. *The Civilians and Canonists use it (the Word Renunciation) in this Sense, as you may see in the Title de Renuntiatione hereditatis sperata.* Now, notwithstanding the Boldness of the Quotation, it is certain, that there is no such Title in either of the Bodies of Law, Canon or Civil; nor is the Subject any where expressly treated, but only some Texts, dropt here and there on other Occasions, have been pick'd up and applied by modern Writers, to this Purpose.

Ib. p. 14. He afterwards makes as if the whole Dispute betwixt us consisted in this, Whether the Right or Hope of a future Succession, could be transferred?

Refut. Whatever might be said upon this Article, I had told him over and over again in the *Reply*, as I have done here, that in the Way I took to impugn his Pretensions, I did not lay any Stress upon the Impossibility of Transfer, but upon the Impossibility of its being of any Effect, when the Conditions respected by the conditional Right were not put; much more when they had become impossible. This is clearly shewn in my fitting to our Purpose his favourite *Simile* of the Fisherman. If his Gravity be discomposed upon his Pretensions appearing ridiculous, in this and other Examples, let him impute it to his Cause, and not to me; since this Way may be as proper as any other, to cure him, if curable, or at least others, of such extravagant Imaginations. What he here says, *That in all Conditional Bargains, the Transferee stands to the Chance*, shews the Truth of the Consequence, which I inferr'd in the Example, that the Fisherman's Transferee lost his Right, by the Destruction of his Nets; and shews no less the Destruction of the Right of S, if ever he had any, to the Estate of T, by G's losing his Capacity to take: which is a Condition without which G could no more take, nor S be entitled to an Estate, than a Fisherman who lost his Nets, could take, or his Transferee be entitled to Fish. — Suppose again Peter promises a yearly Allowance to Paul, so long as he, Peter, shall continue Batchelor. Paul transfers his Right to John; then Peter marries. Does not this Act of Peter, by utterly destroying the Condition of the Payment, destroy also the Right of John, as it would have destroy'd it in Paul if he had not been transferr'd?

Ib. The Opponent is again repeating as a self-evident Maxim, that no Hurt can come to the Title of the Transferee, whatever happen to the Transferrer.

Refut. But 'tis evident from the Case in hand, and the Example now brought, and others, that this Maxim is only true in respect of absolute Rights; of which G had none before his Renunciation to T's Personal Estate: But is very false in respect of Rights conditional, which is all that G can be supposed to have then had, and whose Condition, to wit, G's Capacity, was destroyed at his Profession. The Opponent, in spite of all Sense and common Reason will be always talking of Conditional Rights, as other People do of absolute, which either give a Thing or an *Action* for it; whereas many Times neither of these follow from Rights Conditional, when, as happens infinitely ofteneft, the Conditions are not put.

Ib. p. 12. In his Rejoinder to five of my Answers to so many pretended Proofs in his Discussion, he first goes about to find Fault with what I had said, that so far as Religious are capable to have the Benefit of the *Justinian* Law, so far they are capable to inherit, as may be seen by the same Laws; which last he desires to see proved; and then pours forth his Learning, to prove that no Religious can inherit.

Refut. What he means by his Objection, or what all his Learning is to his present Purpose, (tho' it may be to mine, and it contain otherwise some good Observations, which I have quoted pag. 15.) I cannot see. For I never pretended that any Religious could inherit for himself, or that *Justinian* thought so, as 'tis plain from some of his Laws, that he did not. But 'tis no less plain that he speaks, in others, of Religious inheriting in the same Manner as he would of other Heirs: And namely, in the Law *Deo nobis, C. de Episcopis & Clericis*; as the Opponent may convince himself if he will read it: And this is the chief Law for the Privilege of Monasteries. But there are certain Religious of whom it is not said, that they can any ways inherit by Course of Law and Proximity of Blood, either for themselves, or Monasteries, as *Capucins* and *Observantines*: And this the Opponent, tho' he just now equivocated upon it, would freely allow also as to S, if he had been a little more conversant even with his own S Divines.

Ib. 2dly, He says it is clear by the Pope's Bulls and Constitutions of S, that S has the same Right to succeed dependently of some Will, Contract, or Donation, which other Orders, not excepted, have in Virtue of the Profession of their Religious; and I believe no other Author ever contested this before the Advocate, in Countries, where there are no positive disabling Laws in regard to S.

Refut. Not in the Bull of any Pope whatsoever is there a Word of all this, or any ways tending thereunto, in regard to the Subject in hand, which is concerning Inheritances not fallen before Profession to private S Religious, but which would have fallen to them afterwards, if they had continued in the World. 'Tis directly contrary to the Constitutions of S, as has been proved in the *Reply*, and will be here farther proved in Section 4th. Not one of the more celebrated Divines of S, as far as I have seen, tho' I have examined several, ever said, or seems to have thought it; and the very first Time the Question was started, one of its most noted, especially for Matters of Law, declared expressly, and has thoroughly well argued for the Negative; as will be seen in Section 5th. What an Instance of Assurance have we here? — Then he talks after his old Rate, that all Divines, Canonists, and most Civilians unanimously agree, that all Religious, not excepted in the C. of Trent, have a Power of succeeding, unless in those Countries which have particular disabling Laws. — To which it will be enough to reply, that the said Matter is not now in Agitation, since he has left off sheltering himself under that Pretence, and enough has been said of it in the *Case*.

3dly, After his repeated Exceptions, without any new Reason, to what has been demonstrated over and over again, concerning the Nature of conditional Rights, he alledges, that certain Religious Orders inherit through a Right transferred to them by their Members, tho' these Members are incapable of inheriting at the Time when the Order inherits.

Refut. All absolute Rights of a Professing Religious in many Countries, and some Orders, (tho' not for S) go of Course, if not disposed of, to their Monasteries, as being in the same Countries reputed Heirs and Representatives of their Religious. As to Inheritances falling afterwards, those go to the same, not by any Transfer or Transmission from their Members, but by Act of Law, which in many Countries makes the Body, as to these also, Representative of the Members, and has ordain'd that, whatever the private Religious would have inherited in the World, shall after his Profession be inherited by his Monastery, tho' he himself is destitute of all Civil Rights; and this is the Meaning (conformable, I think, to the Notions he himself delivers in the preceding Page, and which I quoted pag. 15. of this) of the Expression, *Certain Religious, and in certain Places, tho' they cannot inherit for themselves, may inherit for their Body*. But S declares that it renounces to the Benefit of all such indulging Laws.

Ib.

Ib. The 4th Article has been sufficiently refuted before, as also the 5th, when it was observed and granted, that there might be Civil Effects respecting Acts and Accidents of private Religious, tho' there were then no Civil Rights in the said Religious, nor consequently any Civil Effects as to them. All which can make nothing for the Opponent, because the Conditional Right of G before Profession, respected a future Civil Right in him at the Death of T, which Right he had not.

Ib. He goes on to rejoin to four Answers which I had given to four other Objections, which he added in his *first Remarks*. The first of those Rejoinders, is, that the Disabilities of a Professing Religious, are only Personal, and therefore cannot extend to his Body.

Refut. No; they will not properly extend to his Body, tho' from the Personal Disability of the Religious, it may follow, that the Body will get nothing by a pretended Gift. If a disabled Religious pretends to give in present, or transmit to his Body, what he can by no Means have or transmit, the Consequence must be, that the Body will get nothing by such Gift, which yet will argue no manner of Punishment inflicted upon, or want of ordinary Ability in the Body. And the same is to be said, if he pretends to give it any Thing for the Future, and for a Time and Circumstances, and under Conditions which never come to pass, by Reason of Disability in the Giver. And for the same Reason the Renunciation and Transfer would have been of no more Effect, if it had been made to any one ever so free from legal Disabilities, Lay Person or Corporation. As to this, which is the only Thing I am concerned for, the Parity is exact betwixt Attainder and Religious Profession. Thus, if a Son being attainted, should pretend to grant away an Estate left by his Father deceased since the Attainder, to which Estate, were it not for that, the Son would have been Heir at Law (I do not say in Remainder) the Grantee could get nothing by such Grant, how free soever he might be from all Disabilities, and notwithstanding also that the Granter, before his Attainder, or Crime, had transferr'd to the Grantee all his future Rights upon the said Estate. This Case is exactly parallel with ours; and let the Opponent consult his Lawyers thereupon. I would venture to put the whole Cause upon the Issue of their Judgment. Even to keep closely to our Subject of Religious Profession, if the Estate of T was to belong to S, whatever happened to G, it would belong to S, tho' G should be removed to another Order. But I believe, if one, after having made a general Renunciation in favour of S, should remove to another Religious Body not excepted, this latter would not think that S had any Right to an Inheritance which should afterward fall to the Religious so removed. Nay, we have the Case expressly in *Leff. L. 2. C. 41. N. 88*. For in his Time the Custom of Renunciation was establish'd in the Society. And yet he affirms, that if one removes from an Order not capable of Succession as S, to an Order capable, the Right of acquiring *ab Intestato* any Thing afterwards falling, shall revive for the Benefit of the latter. *Reviviscet hoc jus in commodum illius ordinis, & incipiet illi acquirere successionem ab intestato.*

Ib. He affirms boldly, that neither Civil nor Canon Law can bring upon a Religious a Disability which he has not brought upon himself by his Vows. What says he then to the Laws of Mortmain enacted by the Civil Power, and admitted by the Ecclesiastical? Again, Why should not Religious be subject, at least, to Canonical Restraints, which they have never vowed, as well as the Laity is subject to many Civil Restraints, and may be, Canonical, to which it never previously consented? Here he endeavours again to come off by his favourite Distinction of Disability *intrinsical* and *extrinsical*.

Refut. All legal Disability, when we talk of Rights, is equally *intrinsical*; since Right, as his *Lessius* defines it, is only *Legitima potestas, A legitimate or legal Power*, a Power given by Law for the Preservation of Order, to dispose of or demand any Thing. The former, that is the free Power of disposing, according to *Lessius* and all others, besides the Opponent, is the *jus in re*, the latter *jus ad rem*.

Besides, the Disability in Religious, to inherit, if duly considered, will be found to arise every where from their own Vows and Profession. For by these they renounce all worldly Rights, and therefore that of Inheritance. If afterwards the Religious Bodies, in most Countries, have as little Right to inherit as the private Religious themselves, there is no need for this, of any special Law of Church or State, tho' such in reality have been enacted by both. 'Tis enough if these Powers behave negatively, and passively in the Matter: Because renounc'd Rights of Inheritance can never go to others, who have no Connection in Blood, but by some particular Concession and Law proceeding from a sufficient Authority. Now as to S, no such Concession was ever made; at least all Benefit from it has been disclaimed by its Constitutions, as the Opponent affirms, p. 9. of *First Remarks*.

In fine, very much perhaps to his own Satisfaction, I am sure much to mine, and perhaps also to that of my Reader, who may be tir'd of this dry abstract Part of the present Treatise, he arrives at my

my Answer to his last Objection of the Four; and here he says so many Things, that I must necessarily subdivide this Rejoinder into several Articles. Here also he speaks, tho' not quite plain, yet the plainest of any Place I have remark'd in his Performance. First, he says, 'tis absolutely false that G before his Profession never had any Right to T's personal Estate, but under this Condition, that G, at the Death of T should be able to take. This, he says, is absolutely false, as I have shewn, No. 7. if we talk of his moral Capacity; of which we certainly talk, if by Moral he means legal, and I cannot think of any other Meaning he can have.

Refut. It has been seen before, that he has never shewn any such Thing as the Falsity of this Proposition, which also in Terms rather stronger is affirm'd by himself in *First Remarks*: G had a true Right, says he, p. 19. under several Contingencies, to succeed to the Estate in Question, if it fell during his natural Life: For Example, if he were not under Attainder, or a profest Religious. And indeed, a Man must be drove to a very great Extremity, to talk so apparently wide from Truth. Taking the Proposition under the Form of Expression which he taxes of Falshood, it may, perhaps, bear an easier and more convincing Demonstration, than under any other. For if G's Right was not under the said Condition, 'twas legally possible for him to take without this Condition being put; we may therefore, as I argued once before, (p. 13.) and is worth repeating, suppose him taking in the Absence of this Condition; that is, taking without being able to take: which every one sees is a plain Contradiction.

2dly, He adds; Antecedently to G's Profession, his Right was to T's personal Estate, if during the Life of G, T died intestate.

Refut. This was one, but not the only necessary Condition. Another was, that he should not be incapable of taking at the Death of the same, not out-law'd, not attainted, not otherwise civilly dead.

3dly, He brings this Reason for what he added. Because, under the foresaid Conditions of G's being alive, and next of Kin to T, and independently of any others, the Statute of Distributions gives G that Right.

Refut. The Statute mentions not, but does not therefore take off the Hindrances to acquiring, which may come from other general and well-known Laws, as those concerning the Consequences of Out-lawry and Attainder. And to take the Thing under another View, Will the Opponent say, that, on the Account of the Statute of Distributions, G being alive at the Death of T, and his next of Kin, was therefore free from all Hindrance to acquire *ab Intestato*? Even from that of his Constitutions incapacitating him so to succeed? He needed not therefore to have run to his chimerical Transfer, and its more chimerical Effects, but have claim'd from the still subsisting Right of G. And indeed he seems preparing to make an Elopement to this third or fourth Plea.

4thly, He puts a Case of G having transferred such a Right by *Donatio inter vivos*, and then retiring to some remote Corner of our Island.

Refut. I believe he is the first Man that ever gave the Title of *Donatio inter vivos*, to a Transaction about possible Contingencies. *Donatio* is a Term that is not apply'd to Rights, but to their Objects; not even to the Objects of all Rights, but only to those of the *jus in re*, or Rights of Property, and when the Giver has also Possession. Nevertheless, he very much affects to apply the Word Donation to his pretended Transfer, with a View, I suppose, according to his ingenious Way of Writing, of insinuating to the Ignorant, that the Dispute is about some Money or Goods that G had, and gave to S forty Years ago. As to his Example; he has just left out the Circumstance that might make some Resemblance with the Case in hand, *viz.* That the Retirement of G was such as to cause Civil Death; which no ways follows from his chusing a Corner of the Island ever so remote and solitary to live in.

5thly, He finishes by something very fit to crown such a Performance, to wit, by the Repetition of that mighty Objection. *The very Transfer disabled G to take; therefore the Right transferred respected no such Ability.* But 'tis enough to have given Attention twice already, p. 13. to so empty a Cavil. There is no need of speaking to it a third Time. And yet if he has a Mind I should not be too positive in assuring that the transferr'd Right respected Ability in G, I will so far weaken the Proposition as to make it disjunctive, and only say, that either the suppos'd Transfer imply'd a Contradiction, and consequently there was no Transfer, or the transferr'd Right had that respect. For it certainly had, and could not subsist without it, whilst in G.

Thus I have run through, and I think sufficiently refuted the chief Part of this long labour'd Answer, as to what concerns the Substance and Merits of the Cause.

There

There remains only (as to what so concerns) some few Objections, mostly about certain Authorities, which will be better spoke to, after some of the following Sections; wherein I shall treat several other Arguments, which equally affect the Substance of what is in Dispute, and shew more and more that the Plea of Renunciation is as bad as bad can be.

SECTION II.

Nullity of the same Plea of Renunciation, from the Common Law of England looking upon as invalid, and rejecting all Transfer of meer Right.

THE Foundation which I lay for the second Argument against the Plea in Question is this, that from Time out of Mind it has been the general and constant Law of this Nation, that no bare Right whatsoever, no Right of Action, none even of Property, unless attended with Possession or Investment, can be transferr'd at Pleasure from one to another; but that all such Rights can only be perpetuated by passing to Heirs, Executors and Administrators. 'Twas only since publishing the *Reply* that this Proof, which must put the whole Matter out of Dispute, was remark'd by me, upon reading a Law-Book *upon Gifts and Grants*. Upon which I consulted several other like Books on the same Subject, and was soon convinced that such was, and had been from Time immemorial the Common Law of the Kingdom. Nevertheless, as I am no Lawyer by Profession, I chuse rather to deliver this Point of Law, with some of the Authorities which make it out, in the Words of a very understanding Gentleman of that Profession, whom I also thought fit to consult, than in my own.

" 'Tis undoubtedly, says my Friend, the Law of *England*, that there can be no Cession of a bare Right, no Transfer of Right without Property and Possession, unless from or to the King, which Exception is put by the Law. No bare Rights can rise higher than *choses in action*, and no such Things, no Rights, no Actions respecting them can be otherwise transferr'd than by Transmission to Heirs, Executors, Administrators, who represent the Person to whom they first belong'd. See *Perkins's Grants*, 85, 86. *Brook, Chose in Action*, 4. *Dyer* fol. 30. N. 208. 'Twould be superfluous to multiply Authorities upon this Head: Since whoever is acquainted with Law will tell you the same. Our Law knows nothing approaching to Transfer of bare Right, but Remission and Release. Remission, for Example, to the present Possessor of all Claim to his Possession; Remission, perhaps, of my Right of Inheritance to him who stands next in order of Succession. The *Roman Civil Law* allows indeed of the Cession of bare Rights and Actions: But our Ancestors more wisely, I think, for preventing Oppression, by pretended Rights and Actions being made over to powerful Persons, have deem'd all such Cessions and Transfers to be null, and of no Effect. This is the Policy of the Common Law of *England*, this the great Reason upon which our Forefathers have proceeded; and I am persuaded I can defend it to be a good one, tho' the *Roman Lawgivers*, and Lawyers, whom I otherwise very much respect for their great Uprightness and Penetration, have not thought fit to lay such a Restraint. The Assignment of ordinary Bonds, Circulation of Bills to the Bearer, Indorsement of others are for the most part easily reconciled to these Principles of Law: And where, as to some ~~other~~ Things of this Kind, there might have been a Difficulty, and Commerce thereby embarrassed, Provision has been made by special Acts of Parliament, as in Relation to Promissory Notes and Sheriffs Bonds, *Ann. 3 & 4. Cap. 9. Ann. 4 & 5. C. 16.*"

Now, it is plain, and neither denied nor deniable, that G at the Time of his Renunciation had no sort of Possession, nor the least degree of Property in either present or future personal Estate of T. Therefore, by the Law of *England*, which, the Estate being there, must regulate the Disposal of it, G, even if he had had some certain and infallible Right of Action, could not transfer and make it over to S, much less such an imperfect Right, as that must be, which regards a future uncertain Contingency. The very Reason of the Law affects, perhaps, the present Case as much as any that can be imagined. For what Danger of Oppression would there not be, if Pretensions not near so far fetch'd, and better colour'd, could be made over to a powerful Society; rich and powerful in itself, and more powerful in the Interest it has with several great Persons, capable to move, and in the Way and Practice of moving, in those who have a Confidence in it, those powerful Springs the Hopes and Terrors of Conscience; in fine, liable, like the rest of Mankind, to make use of such Advantages, in order to induce others to surrender what it shall covet and be pleas'd to claim? What would have become of Justice in the present

present Case, if S had had to do with some indigent, or inconsiderable Person, or even with any one or two of the Lords and Gentlemen now concerned? And what Justice must be expected for the future, if this Claim be suffer'd still to be kept up?

There can be no Pretence for evading the Force of this universal Law, by Recourse to Privileges of *Ecclesiastical Immunity*. For none of those who have carried this Immunity to the greatest Height, ever pretended that Religious or Churchmen were not subject to Civil Laws relating to the general Forms and Validity of Civil Contracts and Transactions. The Opponent very likely may be more inclined to believe *Thomas Sanchez* than me. Let him therefore hear *Sanchez* in *Decal. L. 7. C. 3. Civil Laws making no mention of Clericks, bind indistinctly Clericks as well as Laymen, when they are not enacted more in Favour or Hatred of Clericks than of the Laity. And tho' Clericks are not subject to the Penalties of the Civil Law, they are yet subject to Laws invalidating Contracts, that are not made after a certain fix'd manner. And this the Law itself declares, L. Omnes, Lib. 1. Cod. Tit. 14. Let all be governed by the Laws, tho' they belong to the Divine House. Omnes legibus regantur, etiamsi ad Domum divinam pertineant.* These Words of *Sanchez* are very conformable to those noted ones of *St. Austin*, in his sixth Treatise on the sixth Chapter of *St. John*, and which have been adopted in the *Decretum of Gratian*, *Can. 1. Dist. 8.* "How does he possess who is in Possession? Is it not by Human Right? For by Divine Right the Earth is the Lord's and the Fullness thereof. Now Human Rights are the Rights of the Emperors, because God has distributed these Rights to Human Kind by the Emperors and Kings of the World. ——— Take away the Rights from Emperors, and who dare say, this is my Farm, or this is my Slave, or this is my House? But if the Rights and Laws of Kings have made, that those Possessions may be retained among Men, why, to please you, would you have us to pass over the Laws in Silence? Don't say, What have I to do with the King? What therefore have you to do with your Possessions? By the Laws and Rights of Kings your Possessions are yours. You said, What have I to do with the King? Do not therefore call them your Possessions; because you have renounced Human Laws, by which they became yours." "Qui possidet quod quis possidet? Nonne jure humano? Nam jure divino Domini est terra & plenitudo ejus. ——— Jura autem humana jura imperatorum sunt, quia ipsa jura humana per imperatores, & reges sæculi Deus distribuit generi humano. ——— Tolle jura imperatorum, & quis audet dicere, mea est ista villa, aut meus iste servus est, aut domus mea hæc est? Si autem ut teneantur ista ab hominibus, regum jura fecerunt, vultis ut reticamus leges ut gaudeatis? ——— Nolite dicere quid mihi & regi, quid tibi ergo & possessioni? Per jura regum possidentur possessiones. Dixisti, quid mihi & regi? Noli ergo dicere possessiones tuas, quia jura humana renuntiasti, quibus possidentur Possessiones." Wherefore, according to the Law of *England*, which in this Particular can by no means be set aside, no Right of succeeding to T, could accrue to S, by a Transfer of the very small Right of G at the Time of his Renunciation: and immediately afterwards, at his second Profession, when he departed his Civil Life, this Right, such as it was, must have gone on to those who then stood next in the Order of Succession, and so must have continued till the Death of T, according as the Order of Succession subsisted to that Time.

Refutations.

Answer 3d. I know not whether the Opponent, when he wrote his 2d Answer to the Advocate's Case, and to Mr. B——'s Third Copy, was aware, that the Law of *England* was undoubtedly such, as has been now represented. Mr. B—— had given him fair Warning of it, when he told him, p. 23, that by all Laws whatever, and especially by the Law of *England*, Nothing but inherent Rights and fix'd Interests, or what amounts to such, can be transmitted to others by Alienation, Donation, Testament, or otherwise: That in our Law the very Word Renunciation was unknown, except in a Case not relating to the present: That in this it can operate neither as a Release, nor as a Gift or Grant: In fine, take it which way you will, 'tis a Nullity, and can be of no Effect. What now does my Opponent answer to this Declaration of Mr. B—— only bearing Testimony to the received Principles of that Profession, for his Skill in which, as well as for his own natural and acquired Parts, he is equally remarkable? Truly the Answer is no less suitable to the Character which the Opponent has thought fit to put on. I answer no: On the contrary it is known to every one who knows any Thing of Canon or Civil Law, that future Rights, and Expectancies of Inheritances, which we hope under certain Contingencies, can be transmitted to others, by Alienation, Donation, or otherways. But here, in my Turn, I must say No: That by the Civil Law, not only these Expectancies in relation to any particular Person cannot be transferr'd, but even when

Contracts

Contracts and Obligations are general, they extend not to Inheritances *ab intestato*, as may be seen in the Words of *Bartolus* and *Baldus* before cited; that 'tis an Axiom in the same Law, that *the Inheritance of a living Man is nothing*, *Viventis nulla est hæreditas*; and that Alienation and Donation have nothing to do in any Law whatever, with any Thing but vested Rights and fixed Interests. The Canon Law is not more favourable to the bold and general Affirmation, than the Civil: Witness these Words of the third Council of *Lateran*, *De Concessione Præbendæ*, Cap. 2. 'Tis shameful, and highly deserving the Animadversion of the Divine Judgment, if the Expectance of a future Succession have Place in the Church of God, which even Heathens have taken care to condemn. *Turpe enim est & Divini plenum animadversione judicii, si locum in ecclesiâ Dei futuræ successionis expectatio habeat, quam etiam Gentiles condemnare curarunt.*

But whatever the Opponent could or could not, would or would not see at that Time, it appears that when he wrote this his third Answer, he was apprised, I suppose, by his Friends *L*, of this Disposition of the Law of *England*, which tho' he does not directly own, yet one sees that in one Corner of this Piece, he is laying in for some Defence against, and some Answer good or bad.

Page 6. N. 6. Secondly, such Transfer is not made void by any positive Law of this Realm: For tho' perchance such Transfer would not be admitted at Common Law, that is no Proof, that it is void in Equity; and if it is not void in Equity, as all that I have said proves it is not, it must be allow'd of in Conscience, 'till it is declared null and void by some Statute, which I am positive the Advocate cannot produce.

Refutation. *imo*, It has been proved abundantly, that the Common Law is expressly against such a Transfer. And the Common Law is no less a positive Law, than the Statute; insomuch that perhaps nine Causes in ten, that come before our Law Tribunals, are determined by Common Law. He has been convinced, I suppose, by Mr. *B*——, in different Places of his third Copy, that whoever requires a Statute enacted by the Legislative Authority, for every Point of *English* Law, shews only his profound Ignorance in the Manners and Customs of *England*; as it would have argued the like in the Manners of the *Roman* Commonwealth, or of the *Roman* World under the Emperors, to have required for most part of their Civil Law a formal Statute or Decree of the supreme Power till the Reign of *Justinian*, by whose Authority the *Digest* was compiled, and received a Sanction. The Matter of our Common Law is much the same as that of the said *Digest* or *Pandecks*; acknowledged Customs, *Responso Prudentum*, Answers of the wisest and learnedest Lawyers met together, Practice of Courts, judged Cases, and approved Opinions of particular Writers. All the Difference is, that in the *Digest*, all this is brought together and confirmed as a Rule of Law, by the Legislative Authority; whereas the same Matter of our Common Law lies dispers'd, and has generally no Confirmation by Statute. This makes the Work both of Practitioners and Judges so much the more difficult; and there may be Inconveniencies in it: But convenient or inconvenient, so it is with us now, as it has been before with others.

2do, The most that he can pretend to have shewn is, that supposing Transfer of Rights allowable, generally speaking, as it is according to the Civil Law, *G*, by the Transfer of his conditional Right to *S*, gave it a Power to claim and seize, even at a Time when the Condition of the Right never had, and never could have been put. How far he has made good this Pretension, has been seen in the former Section, by which it appears that so far from it, it deserves no other Character than that of *perfect Nonsense*.

3tio, But in this Section I wave what I have proved in the first, and stick wholly to a second Argument from the Law of *England* invalidating all such Transfer, whatever might otherwise be its Effects. I must tell him therefore, if he had had a Mind to decline this Argument, he should have gone, but ~~he~~ never did go about to shew, and never can, let him turn which way he will, that tho' Transfer of bare Rights be generally declared invalid by Common Law, yet in Equity such a Declaration no ways affects *S*. But whence can this Equity be taken? I find it amongst the Rules of Chancery, that *it will not relieve against an express Maxim, or the Reason and Policy of the Common Law*. And it has been seen, that it is an express Maxim of this Law, and built upon the Reason and Policy thereof, that all Transfer of a bare Right is invalid, and of no Effect.——Moreover, we are willing to allow any equitable Relief grounded, if not upon the Rules of our Chancery, yet upon some plausible Colour of Catholic Law or Canon; let it be, for Example, of Ecclesiastical Immunity. Now, it has been seen from *Sanchez*, one, as appears from his Words, who judges as highly of this Immunity as any other whosoever, that Ecclesiastical Immunity gives no Relief in

this Case. What then will he have Recourse to? Is it because *S* is very poor, but highly deserving? For my Part I most heartily wish them a competent Provision for going on with the Duties of their Calling, and that their Deserts may receive an Increase every Day, of which Increase the greatest Merit here upon Earth is capable. But neither Riches, nor Poverty, good nor evil Deserts, must determine the Cause in Justice or Equity. These consist in making *equalitas rei ad rem*, an exact Equality betwixt what Law assigns, and what is rendered to each one. And indeed it seems to me, that *S* will have no Reason to complain, if whoever passes Judgment on the Cause, be moved neither by Apprehensions of extraordinary Riches, nor Compassion for a supposed Poverty; neither by Dislike of personal Qualities, nor good Liking. To which may be added this further Consideration, that the pretended Transfer of such a Right can be look'd upon as no better than a meer Evasion, which no Equity ever supports, of that other Part of the Common Law, which incapacitates all Religious to succeed by Inheritance; and an Evasion not only of this Law, but of the Ecclesiastical Law receiv'd amongst all Catholicks, which expressly renders *S* incapable of Succession either by Will or from Intestate, by reason of one of its Profest. For if such a Transfer would give any Right to *S*, after the Profession of one of its Members, the Consequences would be just the same, and of the very same temporal Advantage to *S*, and Disadvantage to the Laity, as if the Profest Member inherited, or *S* by Reason of it, as will be further urged in the next Section.

Wherefore it is very plain, that the Advocate has no need to seek out for a Statute to prove that *S* has no more of Equity than Law on his Side; since as one has been proved to be plainly against him, not the least Proof or Indication has been, or can be offered, for the other's being for him; but the contrary seems fully made out.

The few Words I have been here refuting is all I can find in this late Answer relating to the Argument here treated, tho' it seems not to have been unknown to the Opponent, and is full as strong, and its Force perhaps easier to be apprehended than that of the first Section. But, perhaps, he thought it would not be found out by his adverse Party; and it being his Business to keep the Merits of the Cause as much as possible out of Sight, it was best to say no more upon a Head which laid them too open.

SECTION III.

Concerning the Imperial Civil Law as to the Plea of Renunciation.

THIS Law, and the chief Writers upon it, are so much respected in most other civilized Countries, that upon any Case on which their own particular customary Laws are silent, the Authority of the former is looked upon to be in a manner decisive. Nevertheless, it has not here that Regard and Deference; and tho' not slighted, and, perhaps, on many Occasions, attended, and willingly hearken'd to by our Chancellors, other Judges and great Lawyers, on account of the Penetration and Judiciousness of its Authors, it is yet but seldom mentioned. Wherefore, under this Head I shall only make the two following short Observations.

The first is, that if the above quoted final Law of the 2d Book of the *Codex*, *Tit. de Pactis*, be considered, together with the Reflections above produced of *Bartolus* and *Baldus*, it seems evident that, tho' Cession and Transfer of Rights and Actions be allow'd generally in the Civil Law, there cannot yet, agreeably to it, be any special Transfer of that Sort of Right, which a Man might be said to have to an Inheritance which may come to him *ab Intestato*.—Not only this, but should a Man make a general Cession to another of all Goods and Rights present and future, *had and hoped for*, it would not be deem'd to extend to such an improperly call'd Right, as the aforesaid; which is in regard to Things he has neither in *Fact*, nor *Hope*; at least such a Hope, as can be esteem'd reasonable, and juridical, and capable of being brought into Contract.

My second Observation is, that many are of Opinion that all such general Cessions are invalid by the Civil Law, tho' made for Uses and Ends the most pious and favourable. The Opponent, p. 28. of *second Remarks* makes a long Discant upon this Point; and it would have been to be wished, for the Satisfaction of his Reader, that he had quoted the Words at length of the Authors he mentions; because many of them are not easily met with in *England*; and moreover, his Quotations are generally so imperfect and full of Mistakes, that tho' one has the Book, it is not easy to find out any Thing by them; and if, by Chance, one has light upon something relating to the Subject he is treating, it seldom bears the Sense, and frequently one quite contrary to that which it is quoted for. However,

ever, the Reasons for and against these general Renunciations and Cessions, and with a particular Regard to the general Renunciation usual with S, and to Inheritances which may fall before the farther Engagement of the second Vows, any one, that will, may see well put by *Sanchez, L. 7. C. 3.* He concludes indeed, that these Renunciations, and particularly those of S, are legal and valid. But many are of Opinion, that his Reasons for the Negative ought to have made the Conclusion for that side; and 'tis remarked, that when he concludes upon the Whole, he seems not to be so very positive as usual.

But be that as it will, since we have seen already so many Proofs of the Nullity of the Plea of Renunciation with respect to one of S solemnly Profest, and to an Inheritance falling after such Profession, and shall see still more, against all which no reasonable Objection can be brought, I am very indifferent as to the Matter of this 2d Observation, and willingly consent that every one judge of it as he pleases; as also, of the Authority of the Civil Law, on which I do not insist.

SECTION IV.

Nullity of the same Plea from the express Words and whole Intent of the Rule and Constitutions of S.

Little need be here added to what has been said on this Head in the *Reply*, where every Thing as to this Article is so evident, that many more Words might rather cast an Obscurity, and weaken, than add new Strength. I shall therefore only remark, that, besides the most essential Parts of the S Rule, which are recited in the Bulls of the Popes who first approved and confirmed their Institute, *Paul III. Julius III. Pius V. Gregory XIII. and XIV.* That they be content with what shall be given them out of Charity, that they place their whole Confidence in God; that they have no other Dependence, than the uncertain Alms, Gifts, and Benefactions of the Faithful; that their Profest Fathers, and also the coadjutores formati are incapable of all hereditary Succession. Besides all this, which must make their modern Pretension to Inheritance by Course of Nature and Law very surprising, if they be still supposed to retain some Respect for their Founder, his Rule, or the Popes who have confirm'd and enforc'd the same; insomuch that by *Greg. XIV. Const. Ecc.* they have no Power of altering their Constitutions, without special Licence from the H. See: 'Tis impossible to put together Words more expressly excluding the Plea in Question, than those in which their Constitutions are conceived, Chap. 3. § 12. *Not only the Profest Particulars, and Formed Coadjutors shall not be capable of Hereditary Succession; but neither their Houses, nor Churches, nor Colleges, by reason of them. So all Law-suits and Disputes being prevented, Charity will be best kept with all People, to the Glory of Almighty God. Non solum particulares professi, & coadjutores formati hereditariae successionis non erunt capaces: verum nec domus, nec ecclesiae, nec collegia, eorum ratione. Sic charitas, omnibus litibus ac controversiis praecisis, cum omnibus ad Dei gloriam melius conservabitur.* Now is it possible to exclude Colleges or other Houses from succeeding by Renunciation, to Inheritances which fall after the Profession of any I——t, and which he might otherwise have been entitled to, is it possible to exclude this by Words more express, than such as declare no House can succeed by reason of one so Profest? Is not this a general Expression, which as much comprehends the Way by Renunciation, as any other, that for Example of the *Justinian Law*, or Pretence of a Canon of the Council of *Trent*? If the Succession be by reason of the Renunciation, is it not according to all Use of Speech by reason of the Member renouncing?

The Opponent has affected to translate the *Latin eorum ratione* into *English* not literally by these general Words, *by reason, or on account of*, but by *in Right of them*. I suppose he thought the last Translation would furnish out the little Quibble, that S took such Inheritances in its own Right, which was not forbid. But he did not reflect, that if they came to be it's own Right by means of Devolution and Transfer from another, they were equally, according to the received Forms of speaking, the Right of this other. Thus, a Man who has married an Heiress, is no less, nay oftener said to possess her Estate in her Right, than in his own. An Assignee of a Bond is as properly said to claim the Contents, in Right of the Assigner, as in his own. Wherefore, if any Right be attributed to S, from a preceding Transfer of its Profest Member, as its Claim and Title would be no less properly said to be in Right of the said Profest, than in its own, all its Houses and Colleges are declared incapable thereof by its Constitutions.

How far *S* has, in the present Case, answered the End mentioned in the Constitution, viz. the preventing Law-suits and Disputes, they partly see already, and may see still more. But further, I defy them to imagine any one End or Intent which their Holy Founder, and first Fathers could have in excluding hereditary Succession; which can be answered by only making the Formality of a previous Renunciation necessary, or which is not defeated by making it sufficient, and proceeding accordingly. If only some secondary View of a Law be in some Cases not so strictly complied with, if upon such Occasions the Law be a little soften'd by commodious Interpretations, so much indeed might be thought tolerable. But contrary to the Import of the Words, to substitute a Meaning quite opposite to every End aim'd at by the Law, is a shameful Elusion and Mockery of it; which no upright Man will ever proceed to, who confesses the Law to be still in force, and himself subject to it.

The End of the incapacitating Law of *S*, was not to keep them from one Way more than another, of succeeding to Inheritances: But, on account of the great Confusion it caused in Families, which had induc'd most secular States to forbid it, and the great Distaste which their Founder saw it gave to the Laity, absolutely to exclude the same. Now, when a Thing is absolutely forbid, because inconvenient and hurtful, common Sense tells, it must no more be done one way than another; which is a Truth so universally felt and acknowledged, that the Canon Law has made it one of its Axioms, in 6to Reg. 84. which I must therefore very much recommend to the Consideration of *S*. *Cum quid unâ viâ prohibetur alicui, ad id aliâ non debet admitti.* What one way is forbid to any one, to that he must not be admitted by another.

Refutations.

Answer 3d. Tho' my Opponent's Zeal for his Cause seems to have harden'd him pretty well against the Checks that common Sense, and common Equity are able to give, and made him almost Proof and insensible to all Suggestions that can come from either of these Quarters; I cannot but remark, he is under some Disturbance at the very strong and express Terms, as express as can be imagined, in which his Constitutions condemn what he is contending for. Accordingly I see him in two or three different Places labouring to stifle some Remorses of that Kind in his own Conscience, and very likely in that of many of his Brethren; whilst at the same Time, by strong Affirmations, he is endeavouring to keep the Suspicions of this from his Reader; and by that Means make the Purchase of the Golden Fleece more secure and creditable.

Ib. N. 6. p. 7. Thirdly, the Transfer is not void by the particular Constitutions of that Body of which *G* is supposed to have been a Member; for it is expressly ordered *P. 3. Constit. C. 1.* that before the last Vows, they shall renounce, not only whatsoever they possess at present, but also the Right they have to Goods they hope for, *ad bona quæ sperat.*

Refut. But we have seen in the Passages of *Bartolus* and *Baldus*, that Inheritances *ab intestato*, concerning which is our Dispute, are not to be reckon'd among Goods either *had* or *hoped for*.

Ib. It is not less evident that *S* was capable of acquiring such Right, and being the Transferee, as is manifest from the Pope's Bulls.

Refut. I believe few will think that the H. See, by approving such a Rule of *S*, has determined the Controversy amongst Civilians, Whether general Cessions are valid or no? The given Approbation is sufficiently accounted for, if no Fault was found with the Effects such a Cession was designed for, and which many thought it had a Validity to produce. For the rest, *Valeat quantum valere potest.* Let it avail as far as it may. And however, if it proved invalid, as to all or Part, no great Inconvenience could ensue: Because, if the Renunciation did not sufficiently divest, the 2d Profession, which I am told, follows generally very soon, would do the Work, and rid the Professing Religious of all worldly Incumbrances.

—But, as I said before, in *Sec. 3.* this is a Controversy I need not, and do not meddle with: And so let *S*, if it will, have been according to the Civil Law a true Transferee, upon such a general Cession, and intitled even to any real Inheritance, which would have fallen to *G* before his second Profession. The Question is now, or rather, it can no longer now be a Question, that Inheritances which should fall after that Time, could not have been transferred so as to come to *S*.

Ib. It is certain *S* could acquire all the Rights *G* could transfer, and enjoy them in lieu and stead of *G*.

Refut. Let it be, for so long as *G* himself could enjoy them. But after this, *S* could enjoy nothing from the very Nature of this Transfer, and from the express Constitutions of *S*, which, according to their

their undoubted Sense, as is remarked by *Lud. Molina, de Jure & Justitia, L. 2. C. 41.* declare it incapable, (contrary to what the Opponent here affirms) of coming into the Place of G, for any Inheritance falling after G's Profession. *Neque domus, neque collegia, eorum loco hæredes esse possunt.* Neither Profest Houses nor Colleges can be Heirs in lieu, or instead of formed Coadjutors or Profest Fathers. In the latter of which two States G departed, after having past thro' the first.

P. 18, 19. Here he returns again to the same Subject of his Constitutions, and says, all Objection from thence is answered in the Discussion, p. 2. & 4. In p. 2. is proved, that all S Houses can be made Heirs by any one who has Power to make a Will or Donation.

Refut. Yes, it may be so in some Countries, by those who only dispose by Will or Donation of what is their own; but in no Country by those who pretend so to dispose of what is not, and very possibly and probably might never be their own.

Ib. in p. 4. It is proved, that *what other Religious Orders, capable of inheriting, have in Virtue and Right of their Religious Profest, this S can have in Virtue of a Will, Donation, or Renunciation made by their Religious before their last Vows, at which Time they are capable of making a valid Will, Donation, or Renunciation.*

Refut. No Proof is given of this, as there is no Truth in it, taken so universally, and extended to the Point in Question. All that is true in it relates to another Case, and to such Goods as a Religious is absolutely intitled to before his Profession; not to such which he only might be intitled to in Time to come, if instead of Professing, he had continued in the World. The Opponent, out of his great Cunning, thinks that from a particular Case quite out of the Question, he may palm upon his Reader an universal Proposition, which shall also comprehend what is in Debate.

Ib. Other Orders inherit tanquam suus hæres to their Religious.

Refut. This is true as to Goods which the private Religious were entitled to before Profession. But as to Inheritances which fall afterwards, this is not so properly said: For, as has been often remarked, and the Opponent confesses, p. 14. such Inheritances are taken immediately by the Monasteries, in Virtue of the Laws empowering some in some Places so to do, and indeed not less amply than if they were *suus hæres*.

Ib. I made use of the Word Renunciation as more fully expressing the Nature of such a Transfer, which Canonists and Civilians call *donatio inter vivos*.

Refut. I defy him to produce one Civilian or Canonist who calls a Renunciation of meer Conditionals a *donatio inter vivos*. All these require both Property and Possession as Conditions necessary for Donation. He cannot even produce one Divine, unless perhaps some modern one of the S Order, who has maintained the same extravagant Opinion as himself for enriching it right or wrong.

Ib. When the Houses of other non-excepted Mendicants succeed to Inheritances, which fall after the Profession of private Religious, 'tis *ratione eorum*, by reason of these Religious: But when S Houses succeed to Inheritances by Will and Donation of the like Religious, made before Profession, 'tis not *ratione eorum*.

Refut. I would fain know, according to what Rules or Analogy of Speech, a Person succeeding on occasion of some Act or Quality of another, shall be said to succeed by reason of this other: But a Person succeeding from another's giving the Thing, or, in our Case, transferring all the Right he had to what might possibly come to him of it, shall not be said to succeed, if he ever does, *by Reason, on Account, or in Right* of the other.

P. 28, and last of this Piece. The Opponent takes up once more, and finishes with this Subject upon the Cry, he says, of the *Abbettors of the Advocate*; but I rather believe upon some Cry of his own Conscience, and those of his Friends and Brethren, not content with his confused, inconsistent Notions engrafted upon a continual Abuse of Words. He yet adds nothing to what has been already refuted; and only repeats that other non-excepted Mendicant Orders, pre-supposing the Profession of some Member, succeed *ipso facto & ratione ipsius*, to Inheritances, which would have fallen to the Religious, if he had staid in the World. But that S, pre-supposing the Renunciation of its Profest, succeed thereupon, and therefore not *ipso facto* and *ratione ipsius*, which, says he, is no Quibble. And indeed it is not; it does not even deserve that Name. 'Tis something beneath a Quibble. If, as the like sometimes happens, different Ways of speaking, tho' there was little Difference in the Meaning, were usual in two such Cases, so his Distinction would have arrived to the Dignity of a Quibble. But there is not the least Colour for pretending that the Mendicant S, inheriting

heriting by a Right transferred, is properly said not to inherit by *Reason*, or in Right of its Member, and the other Mendicants so to inherit.

SECTION V.

Nullity of the Plea of Renunciation, from the Doctrine of the most celebrated S Divines; together with the History of the Origin of this Plea.

TO reduce the Matter of this Section to a proper Form, I propose, and undertake to prove the two following Positions.

1. *The most celebrated S Divines who appeared in the 16th Century, and till about the Middle of the last, have not given the least Intimation, as if they thought any Right could accrue to S, to an Inheritance falling after the solemn Profession of one of its Members, from a general Renunciation in favour of S, made by the same Member before his Profession. On the contrary, they have signified as much against such a Pretension, as can be expected from those, who had never examined the Question in particular, and seem not to have had any Suspicion, that such Question would ever be made.*

2. *When the Question was first started, one of the most celebrated of the said Divines, especially for Matters of Law and Justice, declared expressly for the Negative: And it was not till many Years after, that another Divine of the same Company took up, as beneficial to S, and maintained the Affirmative, pretending to refute what had been said by the First; of all which he acquitted himself most weakly and negligently: In a Word, little better, only that in fewer Words, than the Opponent himself.*

To make good what I first say of the most celebrated, and more ancient S Divines, I shall instance in *Ludovicus Molina, Sanchez, Suarez, Lessius, and Layman*, to whom I will join the somewhat later *De Lugo*.

As to *Molina* he generally affirms, (iv) *To our Profest Houses, who are capable of having the Property of Goods, not only Legacies, but also an Inheritance may be left as Alms, by the Faithful of Christ. Only Immoveables must be sold, as soon as a fit Price can be had for them; because those Houses cannot have the Property of them.* Here he affirms no more than what was granted in my first Paper, that S might be made Heir by a voluntary Institution, with this Exception only, that its Profest Houses could not retain Immoveables: But we shall see presently, that the same Author excludes in the strongest Terms all Right upon any Pretence whatsoever in any of the Houses of S, to succeed to such Estates as only would belong to their Profest Members, if they had never Profest.

Sanchez, L. 7. C. 3. speaks something more particularly to the same Purpose, (v) *Altho' neither the Society, nor its Colleges have a Right to succeed in the Name of their Religious, as other Orders have, excepting the Minors; yet when these Religious, before their Profession, dispose of their Goods by Gift or Will, they may make a Profest House, or College their Heir. 'Tis proved, because it is lawful for them, by our Constitutions, to leave any thing either to Profest House or College, and no Distinction is made, whether under Title of Inheritance, Legacy, or Donation. Nor is a Profest House incapable of receiving such Things, but incapable only of the Right of succeeding in the Name of its Religious.* Here it may be remark'd, what care *Sanchez* takes to repeat twice over, that S cannot succeed in the Name of its Profest Religious. What would he have said at the proceeding of our *English S*, who as soon as the Breath was out of the Body of *T*, seized all in the Name of their Profest Religious *G*?

Suarez, in the Place quoted in the *Discussion de Relig. L. 8. C. 17.* says nothing to the present Purpose, as indeed upon such Matters he mostly refers himself to *Sanchez*. *Suarez* there only examines whether Crops of Corn, Grain, Granaries, Flocks, and Cattle can belong to or be retained by S.

Lessius L. 2. C. 41. Dub. 10. & 11. (where he treats the Subject of the Succession of Religious especially S,) without mentioning, and even generally denying any Right of Succession in S, as well as in the excepted Mendicants, excludes S expressly, as has been seen before *P. 17.* from succeeding, on any Account whatsoever to an Estate falling *ab Intestato*, and which would have fallen to its Profest if he had continued in the World, because, says he, *this Right perished at the Profession of the Religious.*

Layman, I can find to say no more upon this Matter than what we had before out of *Molina*: only he adds (as quoted in *Answer First*) that the Difference betwixt the *Capuchins* and *Jesuits* is this, that the Profest of the former, not only single, but in Body, cannot be instituted Heirs: whereas the Profest Houses of the latter

latter may be so instituted.—But not a Word of their getting an Inheritance any other Way, than by the voluntary Institution of a Testator.

But *Molina* deserves to come upon the Stage a second Time, for those his Words referred to P. 29. from his Treatise *de Jure & Justitia Disp.* 139. (vi) *All both Profest and Spiritual Coadjutors of the Society, by the very being so, eo ipso, are incapable of all Property; as also neither the Profest Houses, nor Colleges, nor any one else, can be Heirs in their stead: But to that effect they are reputed as naturally dead.* Surely the Opponent himself cannot but see his Condemnation in these Words. For when by vain Distinctions he thought to reconcile his Error with that Decree of his Constitutions expressed under any of these Forms; no House can succeed by Reason, on Account, in Right of a Profest: He yet maintains P. 7. that their Houses may succeed in Place or Stead of a Profest.—Again, he here sees that a Profest, as to any Succession which might have fallen to him, is to be look'd upon as naturally Dead.

As to *Lugo* the Opponent observes very well P. 21. that if his Words be laid down in their proper order and duly weigh'd, they do not signify that any House of S can succeed *ab Intestato*. Whence it follows that no Argument can be drawn from them; for what I said in the Reply they seem'd to import, tho' I declared at the same Time, I did not think to be his Opinion, viz. That an Inheritance could ever come to S, any other Way than by a voluntary Institution of a Testator. And upon this Occasion it will not be amiss to give here a Passage of the same Author, which I had not Remark'd. *Disp.* 3. N. 99. but with which the Opponent furnishes me P. 21. *The Society has this small Difference from Observantines, that its Houses may be instituted Heirs. Abiis differt aliquantulum nostra Societas, quia in ea (Domus omnes) possunt Hæredes institui.* Now 'tis certain the pretended Transfer was no Institution of an Heir, nor did or could G institute an Heir to T, therefore S could no more succeed to T's Inheritance than Capuchines and Observantines.

Such appears to have been the Way of speaking of the chief of S Divines, exactly conformable to what I affirm'd in the 1st Position: And yet my good Opponent has the Conscience to cite them all (except *Layman*) p. 3. of his Discussion, as Abettors of his Pretension.

Position 2d. When the Question was first started, one of the most celebrated of the said Divines, especially for Matters of Law and Justice, declared expressly for the Negative; and it was not till many Years after, that another Divine of the same Company took up, as beneficial to S, and maintained the Affirmative, pretending to refute the First; of all which he acquitted himself very weakly and negligently, in short, not much better, tho' in fewer Words, than the Opponent himself.

One would not easily believe, nor could I ask Belief of any one, that this celebrated Divine was no other than *Thomas Sanchez*, in *Decal.* L. 7. C. 7. N. 25. whom the Opponent, after delivering the Substance of his Plea, Discussion, p. 3. quotes as teaching the same, almost in the same Words; If I had not myself transcribed out of *Sanchez*, a Lyons Edition, I think 1623, the following Passage here turn'd into English.

Sanchez, in *Decal.* L. 7. C. 9. N. 25. (vii) *From hence is deduced the Resolution of a Question upon which I was lately consulted. One of the Society S, according to its Constitutions renounces to all his Goods, and to a future Inheritance in favour of the said Society, or some other. He is afterwards Profest in the same Society, or at least makes the Vows of the form'd Coadjutors, and dies, leaving a Kinsman in an Ascending Degree, (suppose an Uncle, to whose Inheritance he had renounced in favour of S) Will the Parents succeed upon the Death of the Uncle? To which Query it must be thus said, If the Renunciation was of a future Inheritance, supposing it to have been valid, all its Effect and Virtue ceases, as soon as the said Religious is naturally dead, whilst the Ascending Heir survives, to whose Inheritance he renounced: Because this Renunciation has the tacit Condition, if the Inheritance come to the Renunciant, as we said before. Now the Inheritance cannot come to a Monk in the Lifetime of his Parent; because there is no such Thing as the Inheritance of a living Person. L. superstitis ff. de acquirenda hæreditate. Wherefore it is necessary that the Father die in the Lifetime of his Son the Monk, that the Son acquire the Inheritance of the Father; and if the Son die first, he could transmit nothing of the paternal Goods to any other Heirs; as is very well said by *Guttierres Quest.* Canon. L. 2. C. 1. And the same Thing is to be said, if he makes his Profession or Vows of Coadjutors in the Lifetime of that Ascending Kinsman; because by these he is look'd upon as naturally dead, in the Manner that Doctors pronounce of the Profest Brothers of the Order of Minors, and as we above observed. — Then he proceeds to explain what Share the Parents might have notwithstanding any Renunciation of the Goods which a Profesting Brother was actually possess'd of; which may be seen in the Latin, tho' as not making to the present Purpose, I have here left it out.*

I will

I will not go to aggravate the Fault of the Opponent, in quoting for his Side an Author so plainly and directly against him, but leave every one to put the most favourable Construction thereupon, that he well can. In the mean while several Things may be observed upon this Passage. 1^{mo}. Notwithstanding that we have seen above, that *Sanchez* admitted the Validity of Universal Renunciation, and seems here to admit the like of a Renunciation to one particular Inheritance, *viz.* That of the Ascending Kinsman; he yet says such a Renunciation can be of no Benefit, if the Renunciant Professes in the Life-time of him, to whose Inheritance he Renounced. 2. He grounds this Decision on the very Argument which I chiefly insisted upon in the *Reply*, and here Sect. 1st, that the Renunciation in Favour respected this Condition, if the Inheritance came to the Renunciant. 3. As to the Effect of any Benefit to come to S, he makes a perfect Parity betwixt Civil and Natural Death, and extends the same (as *Molina* does also in his Text last quoted) to the excluding the Lay Heirs of the Profest Religious. 4. He speaks generally of all Inheritances, and makes no Difference (as to which Point I could not be positive in the *Reply* N. 8. and 16.) betwixt those of Collaterals and Ancestors, in the latter of which by the Civil Law a Legitimate Portion, whenever they fall, is due to Descendants. 5. When he begins to give his Answer, he puts in the Restriction *supposing that the Renunciation is valid, casu quo est valida*, which confirms a Remark made before, Sect. 3. Page 27. That *Sanchez* was not very clear upon the Validity of Renunciations.

Here I own that one of the S Divines, by name *Castro Palao* (and he is one of the many quoted by the Opponent *Discuss.* P. 3.) has declared for his Sentiment: This I would not affirm in the *Reply*, N. 16. because I had not then seen the Author, and when I got sight of him, it was not by the Quotation, but after much Search and by Chance, that I found out the Place, where he speaks to this Purpose. He must have wrote a considerable time after *Sanchez*, if what I read of them be true that *Sanchez* died in the Beginning of the last Century, but *Palao* not till towards the middle.

Castro Palao, as the Opponent quotes *Treat.* 10. D. 1. *Puncto* 3. I have only markt down *Punct.* 18. *De Renuntiationibus, Obligationibus, & Donationibus factis a Novitiis Jesuiticis.* (viii) "There remains this weighty Difficulty to be solved, whether if a Novice or one of only his first Vows renounces to his Paternal Inheritance, and afterwards Professes, or takes the second Vows, and then the Father dies the Son living, whether the Society can succeed to the Inheritance of the Profest. *Sanchez* denies L. 7. C. 9. N. 25. moved by this Reason, that if the Son dies before the Father, the Inheritance of the Father never comes to the Son, since it cannot come to the Son in the Father's Life-time, there being no Inheritance of a Living Person, L. *Superstitis*. Now Profession in the Society is held to be equal as to this Matter to natural Death, since neither the Profest, nor the Society by Reason of him, is capable of Inheriting. Therefore. And he confirms his Answer by the Example of the Fryars Minors, by Reason of whom the Monastery cannot succeed. But the Profest of S are equally unable to inherit. Therefore.—But these are but light Grounds to deny thereupon the Inheritance to the Society." (When the Difficulty was first consider'd, it appeared to be weighty; But upon Reflection that resolved one Way, it would deprive the Society of great Gains, the Grounds appeared to be light.) "For as *Sanchez* himself testifies in several Places, namely L. 3. C. 3. N. 68 & 78. and *Molina* of the Spanish Primogeniture, L. 1. C. 13. N. 9. Civil Death, such as is Religious Profession, is rank'd with natural Death, when it has the same Effect. Not so when the Effect may be different. But in the present Case Profession may have a different Effect; because Profession does not extinguish the Rights of Profest Jesuits which have been transferred to a third Person, but only such Right as would otherwise remain in the Profest. Again, the Inheritance in Question does not come to the Profest of the Society, as the like would not come to the Profest of any other Order, who should have renounc'd in favour of a College or any good Work, but would come to them, in whose Favour the Renunciation was made, by reason of the Right acquired by such Renunciation, as *Sanchez* himself has proved from several Allegations, C. 6. N. 2. Therefore that Inheritance comes to the Society in the Right given to it by the Profest, at the Time when he was able to make such a Gift. Nor is it any Obstacle to the Succession of the Society, that the Profest, at the Time that the Father dies, and the Inheritance comes to the Society, is incapable of succeeding, because the Society does not succeed upon any Right then given to it; but upon the Right which was given at the Renunciation, which no ways comes by the Profession. After the same Manner, in the Order of Minors, a Right of Succession, which one of those Religious should have given, before his Profession, to some College capable of Succession, would not be ex-

“extinguished by his Profession, but rather confirmed; as the same *Sanchez* allows, Ch. 3. N. 79.
 “But the Resemblance of the Minors with the Profest of the Society consists in this, that as the Minors after Profession are incapable of acquiring an Inheritance, or the Monastery on their Account, so neither the Profest of the Society, nor the Society by reason of them.”

I really do not judge so hard of the Opponent, as to think he ever saw *Palao*: Since, if so, he could never have ranged him and *Sanchez* of a Side; the former declaring *Sanchez* is the Man whom he impugns. But as the Opponent's Principles are the same with those of the other, and his Form of Expression oftentimes perfectly alike, some Body, who had read *Palao*, must have furnished him Memoirs. The Objections brought against *Sanchez* have been answered over and over again. Nevertheless, it may not be amiss to say here a Word to them, as they rise from the Fountain Head.

Objection 1. Civil Death is only to be rank'd with natural Death, when the former is otherwise proved to have the same Effects.

Answer 1. This is a very wrong Notion of that and other Law Similies, as has been shewn, p. 14.
 2. It is a great Inattention in *Palao* to think he hereby attacks *Sanchez*; for *Sanchez*, without any mention of Civil Death, only lays down as his Principle, that the S Profest could no more succeed, than if he was naturally dead, which *Palao* cannot deny. And 'tis from hence that *Sanchez* infers, as a Consequence, that the Renunciation of an Inheritance, under the Condition that it came to the Renunciant, must be deprived of all Effect, by the Renunciant's Profession. Whence *Palao* does not seem so much as to have apprehended the Force of the Argument of *Sanchez*; which is not merely because when the Inheritance fell, the Profest was unable to succeed, but because nothing was renounc'd and ceded but under the Condition of the Renunciant's succeeding, or being able to succeed, at the Time that the Inheritance should fall; which Condition could not, and did not, take place.

Object. 2. Profession does not extinguish Rights transferred.

Ans. I distinguish: Rights absolute, granted. Rights conditional: I distinguish again; If respecting as a necessary Condition, an Ability destroyed by Profession; denied. If respecting no such Ability; pass.

Object. 3. Such a Right renounc'd by *excepted Minors* (for of those he speaks) would be of Benefit to them in whose Favour they had renounc'd: For which he cites *Sanchez*, N. 79.

Ans. I have not now *Sanchez* by me: But his Argument makes equally against any thing to be got by any one from a Renunciation of future Inheritance, made by an excepted Fryar Minor.

Object. 4. At least a like Renunciation made by any other Fryar or Monk would have its Effect after their Profession (for such seems to be *Palao's* Meaning in his first Argument from other Religious) *tho' the Inheritance could not come to the Profest of any other Order.*

Ans. For this very Reason, and the Considerations brought p. 15. conformable to those of the Opponent himself, I think such a Renunciation made before Profession, by a Religious of any Order, could have no Effect afterwards to the Advantage of the Renunciate; and, I believe, most non-excepted Religious will be of my Mind. If any are of another, it must be because they think that private Religious of the non-excepted Orders may be properly said to *take*, in the Law Sense of these Words, *by Inheritance*. But 'tis agreed on all hands, that the excepted Fryars and S cannot so take.

Object. 5. Tho' S may take what has been so renounc'd to it by those afterwards Profest; it can no more take *ratione illorum*, by reason of them, than the excepted Fryars.

Ans. The Inconsistency and Contradiction of this to all ways of speaking, has been sufficiently shewn at the End of the last Section.

As to the other Divines not hitherto taken notice of by me, but mentioned by the Opponent as concurring in his Sentiments: First, for *Tamburin*, I enquired in the *Bodleian Library*; but he was not there. Secondly, for *Tancred* and *Pelise*, my Correspondent at *Paris* made Search in several Libraries; and particularly in those of S, but they were to be found no where, and the Librarians of S declared, they knew not who, or what they were. These are the Authorities, some known, some unknown, some real, some fictitious, few for, most against him, upon the heaping up of which the Opponent values himself, and upon which with tacking thereunto these great Words, *All Divines, all Canonists and Civilians, Bulls and Constitutions*, he thinks it much we will not come over to his Side.

Nevertheless, I cannot answer how far the Resolution of *Castro Palao* may or may not have got ground in the Society, wherever the Laws of the Country, or Patience of those they had to do with, would permit it to be put in Practice. I have yet heard from one who lived many Years at its chief House at *R——*, that the chief Fathers there, from all Parts of *Europe*, declared generally, that such Pretensions were never made in their Provinces.

Refutations.

Answer 3d. Under this Section will come properly to be considered what the Opponent rejoins to some Answers I had given to certain Authorities of Persons in Dignity, which he pretends to be of great Moment. And, First, P. 16. N. 5. he is for vindicating the mighty Importance of a Sentence of the supreme Tribunal of the Dutchies of *Parma* and *Placentia*, in favour of a House or Church of *S*, in a Case like ours; upon which he seems greatly displeased at the *Advocate*, that he rather chose to laugh, than to be much concerned at the Allegation of this *respectable* Sentence. But I must beg leave to represent to him, that Things have sometimes two Faces, the one seriously bad and shocking, as bad Arguments for a very bad Cause; the other ridiculous, as when they consist of a grotesque Mixture of great and little. Now, in such Cases, 'tis often better for the Advocate, both for keeping himself in good Temper, and drawing his Hearer or Reader from Error, to consider and expose the risible Face, than to look at and shew that which is frightful, and might raise Indignation. But if I must not be allow'd to be merry, I must then seriously take notice in the first Place, that the Account of the Proceedings at *Placentia* came, as 'tis said, to General *Tamburin*, by whom it is said to be handed to us, from the *Collector of Portugal*, a Country about some six or seven hundred Miles distant from either the Scene of Action, or Place of Habitation of the General; whereas the two last are not distant a third Part of the Way. All this, a shrewd Mark that the Story is not much to be depended on. Then altho' amongst the *Buoni Lombardi*, the supreme Court of *Parma* and *Placentia* may be very *respectable*, yet 'tis abusing this good Word, and the rest of the World, to alledge a Sentence given amongst them, as deserving so much Respect, that it ought to be taken for Law or Precedent in all other Places. Lastly, Whoever is acquainted with the History of our present Times, is not ignorant that such inferior Sovereigns, as was a Duke of *Parma*, have a remarkably greater Influence, and meddle more with their Courts of Justice, than higher Powers: 'Tis no less certain, that *S* has oftentimes a stronger Influence over the same lesser Sovereigns, some Times for one Reason, some Times for another; some Times, perhaps, because it has lent them Money; other Times, for the Service it may render them at superiour Courts: To which if you add the immediate Ascendant which *S* may have over Judges of low Fortunes, and inhabiting little Towns, one may rationally enough account for a very absurd Sentence having been given, if it ever has been given, in its favour by such a supreme Tribunal.

P. 18, 19. In these he still pretends to make out, that certain Proceedings of *S* Congregations and Generals, are great Arguments for his Side of the Controversy. The Proceedings of the Congregations consist in this, that they would not at all meddle with the Dispute, but left it to the General to determine thereupon. All that can be said to this Part is, that the Attempt to draw an Argument from thence for either side is so visibly ridiculous, that it would be superfluous and even ridiculous to employ any more Words about it.

As to Generals, two of them, *Tamburini* and *Rets*, are said to have made Declarations in favour of the Opponent's Cause; and for Proof thereof, and to satisfy our Curiosity, the two following Lines out of one of them are produced. *Utantur jure, quod per legitimam alienationem, in communitatem ipsorum vel nostram translatum est, agantque omnia quæ ad vindicanda bona, vi talis juris translati competentia per leges patriæ agere oportet.* Let them make use of the Right which by a lawful Alienation has been transferred either to their Community (I suppose the Province, or some of its Houses) or ours (I suppose General Stock or Publick Treasure;) and let them do all things allowable by the Laws of the Country, to get to themselves the Goods so belonging, by means of the said transferred Right.

Refut. Whatever might be the Context of two Lines; without seeing what in each Piece goes before and after, it would be hard to make a Judgment of the Import of two Declarations. Much more may this be said of two such Lines as are produced, which are couched in so ambiguous and oracular Terms, that they determine just nothing; and may as well be brought for an Argument by one side,

as by the other : For our Question is still undetermined, whether the pretended absolute Right of S, in the Year 1743, to T's personal Estate, was ever transferred to S by a lawful Alienation. The Terms most remarkable in these Lines are those whereby one of the Generals gives the Word, that they do all things, which the Laws of the Country permit, to get what belongs to them by a lawfully transferred Right. Whence I presume he would not condemn the adverse Party, if no such Right has been transferred by a lawful Alienation, to do all it can by the Laws of the Country, to hinder S from getting. I suppose also, if the establish'd Laws of the Country, both ancient and modern, as has, and will further be here made out, forbid and invalidate the pretended Transfer, especially to S, he would have S to think of nothing else, but, without further Trouble or Molestation, to let the others take what is their own.

It. He still endeavours to persuade, that the Judgment of the Generals, especially after the Cause had been remitted to them by a Congregation, having been, as he says, favourable to his Side, is of very great Weight, especially as to there being nothing in the Practice he defends contrary to the Constitutions of the Order.

Refut. Let him talk as big as he will of Congregations, their Members, their Merits, and those of their Generals, and the great Demerit there would be in their pronouncing contrary to their Rule, and even in not pronouncing conformably to it, I must still beg leave to insist, that when Interest or Passion are concerned in the Cause, they are not the best, but on the contrary, the very worst Judges of the Meaning of their Constitutions. Where Passion or human Frailty are only so far concerned, as to suggest some loose Interpretations in favour of greater Ease within their own Walls, and amongst themselves, we Advocates have nothing to do, and leave them to the Inspection and Direction of those who are Superiors to Congregations and Generals, as well as to private Companions. But when their Interest, in Opposition to that of others, no ways dependent on them is in Dispute, we and every one so concerned must insist, that their Interpretations, even of their own Rule, are not to be trusted, and that other Persons can best judge betwixt us. No matter if they had first the drawing up of their Rule ; no more than if one of two Parties contending about the Meaning of a Bond, had had the drawing up of it. Concessions, Renunciations, Abdications concerning those without, especially when approved of, and enforced by the Legislative Authority for such Matters, are no longer under the Controul and Judgment of Superiors of Religious Orders, within. And hence, in any Disputes hereupon, Advocates without, plead upon, and Magistrates judge from the Words of such Constitutions, just in the same Manner as they do from other Laws. And this is so true, that the most inconsiderable and pettiest Jurisdiction in *Europe* would not give the least Attention, or perhaps a Hearing to the Declaration of a General interpreting the Rule of S, as to a Cause depending betwixt a Jesuit and a Stranger.

To these he adds, p. 25, what comes near the Subject now treating, the Authority not of some Dignity, but an Attendant upon Dignities, a *Roman Advocate*, I know not who, who opines for the Plea of S. And this is an *Anecdote*, a curious Piece of private Intelligence he has gathered from a Manuscript, supposed to be of the *English Advocate* ; tho' the same had told as much in Print, at the End of the *Case*, his first Paper. Well, since he loves *Anecdotes* so much, I will tell him in Print this other, which he may add to his Collection, that the same *Roman Advocate*, when he talks of the pretended Powers and Privileges of S, still modestly adds, *Nisi aliter disponat localis aliqua consuetudo ; Unless the Custom of the Place otherwise dispose*. Let him then consider that ancient Law and Custom of *England*, which invalidates all Transfer of meer Rights : And if he will imitate the Modesty of my Brother Advocate, he will never pretend a meer conditional Right of G could possibly be transferred to S.

A little before, p. 20, 21. he had made some Reflexions on what I said towards the End of the *Reply*, concerning some Quotations in *Answer First*, of *Lugo* and *Lessius*. *Lugo* I had not then lately seen, *Lessius* I had by me. He shews very well, as I remark'd, p. 31. that the Words of *Lugo* are not so to be construed, as to make him say, that any House of S can succeed *ab intestato*, (which yet is rigorously true, if S had a Right to succeed to T) nor consequently so as to favour the Plea. But he quite misrepresents the Doctrine of *Lessius*, when he would have it to be no ways opposite to the same Plea. *Lessius*, says he, only denies that S has a Right to succeed to such Goods, which the Religious had before his Profession, and did not give to S. Pardon me, Sir, he also denies that S can any ways succeed to such Goods, as the Professed had not then, but would have, if he continued in the World.

For, says *Lessius*, in the Place referr'd to, all Right in the Profest to such Goods perishes at the Profession, and can never revive to any Benefit of S. And it is visible that for a Religious Body to have any sure Way of succeeding to Inheritances, which its Profest might have succeeded to, has much less of the Spirit of Poverty, and is much more apt to create Disturbance in Lay Families, and more opposite to Civil Laws, than if the Goods of which the Religious was actually possesst at his Profession, and had not disposed of, should devolve to his Body.

And now I may conclude my Refutations of what the Opponent has said in his last Answer, concerning the Substance of the Cause, and upon concluding I cannot but make two Reflections, and recommend both to my Reader and the Opponent, to give them a little Place in their Mind. The first is, That in the whole Set of loose Cases, which the last Century furnished very plentifully, there is not perhaps any one, that gives so clear an Instance as this, which he somewhere says *he resolved*, what Injustices, what Absurdities and Nonsense, Men otherwise of good Parts and Learning, and supposed to have a Sense of Religion and Justice, will fall into, when they are strongly bent to advance their own Interest, or that of their Friends, and think it perhaps a fine Thing to have found some Colour to favour Cupidity more than had been thought of before, and to enlarge the Path to Heaven more than their Forefathers ever imagined it could be!

My second Reflection is, that indeed the Glory, or rather the Infamy of this Solution belongs originally to *Palao*, from whom it has been dealt out to some of his succeeding Brethren. Those who directed the wise Men of *Placentia* seem to have gone upon his Notions. The same must also have prevail'd in the Council of some General, if the Words quoted by the Opponent have that Meaning which he seems to have a Mind they should be taken in. The Principle, I suppose, which *Palao's* Successors have gone upon, is this, That he having taught Divinity for a considerable Time in several of our Colleges, must be look'd upon as a *probable Doctor*. Therefore, without any further Enquiry, any Opinion of his may be safely followed. I will not pretend to determine, how far the Fault of a weak, ignorant Person, who had happened to be under the Direction of *Palao*, and had thus blindly proceeded upon his Authority, might have been thereby excused or lessened: But I strongly maintain, such an Authority can be of no Excuse to People of Sense and Learning, altho' they neither had before them the good Arguments of *Sanchez* for Truth, nor the other visibly bad, which *Palao* brings to recommend Falshood. I am moreover for allowing as much as any one, to the Advantages and Merit of Obedience from Inferiors, especially Religious, to Superiors, when there can be any reasonable doubt whether that be lawful, or unlawful, that a Superior enjoins or recommends. But when it is evidently bad, Obedience so far from being meritorious, only makes a Complice in Iniquity; and the Rule which the Inferior should have followed, is that delivered in the *Acts* of the Apostles, *Cap. 4. Si justum est in conspectu Dei vos potius audire quam Deum, judicate; Judge if it be lawful in the Sight of God to hear you rather than God.* And thus, in our Case, in which all is clear and evident to Men of any Understanding, I cannot but recommend to several of S who may be well intentioned, not to let themselves be drawn in by any Pretence of Obedience due, any more than by Hopes of a Share in the Profit, to abet and cry up Pretensions which appear to be manifestly unjust.

SECTION

SECTION VI.

Shewing that neither G nor S have, or had any well-grounded Claim on the personal Estate of T, from the Law of England; whether it be considered as it was before the Change of the National Religion, or as it now stands. With an APPENDIX, proving that the Nepotism of G have no Right to the said Estate, preferably to others in equal Degree of Kindred to the Intestate T.

PART I. Concerning the Ancient Law.

WHEN we talk of the Ancient *English* Law condemning, or favouring the Pretensions of S, we do not take it merely by itself, but consider it in Conjunction with the modern Law, such as it has been settled by the Statute of *Charles the II.* for the Distribution of the Estates of Intestates. So that the Meaning of the Assertion, according to the Ancient Law, neither G nor S have, or had any Right, must be look'd upon the same, as if it were said, Neither G nor S would have had any Right in Ancient Times, if the Statute of Distributions had been then in Force. For all Parties agree, that Right to the Personal Estate of T must be now judged of with respect to the said Statute, and so as to allow it its full Force. This being premised, I thus prove, that according to the Ancient Law, neither G nor S have, nor had any Right to the Estate in question.

The Right, and all the Right which the next a-kin now have to the Estates of Intestates, is from the Statute of Distributions: But the Right now given by the Statute of Distributions, was by the Ancient Law refused to all Profest Religious. Therefore, by the same Ancient Law, that Right which the next a-kin now have to the Estates of Intestates, was refused to Religious.

I believe the first Proposition will not be denied me, because it is visible that all the Estates of Intestates are now taken under the Statute. The second I thus easily prove, because the Right now given by the Statute is a Right of Inheritance: But the Ancient Law refused all Right of Inheritance to Profest Religious. Therefore.

'Tis true, the Word *Inheritance* was not anciently apply'd to personal Estates; and the Meaning of that Word, and Reasons of the Law against Religious inheriting, did not regard the then way of Succession to personal Estates, especially of Intestates. But now

First I say, that the Way of succeeding to Estates under the Statute, is a Way of Inheritance. For what is a total Inheritance by Law, according to all Lawyers, but a Right arising from Proximity, and by Order of Law, to all Goods left by the deceas'd, and by which the Heir stands in his stead, and represents his Person? A Right therefore so given by Law to Part of his Goods, and so as to represent his Person with respect to such Part, is a partial Inheritance. And so our *English* Lawyers commonly expound the taking of Intestates Estates under the Statute of Distributions formed upon the Model of the Civil Law, and giving the same Right, as to personal Effects, to those who succeed by it, as the Civil Law does to Heirs *ab intestato*. So the Opponent and the whole S Family have constantly understood, in this Controversy, the Succession to the personal Estate of T; and so the Opponent both in his last Answer, and all his other Papers, in Conformity to *Castro Palao*, has maintain'd it belonged to S.

And should any one scruple, tho' unreasonably, at calling *Inheritance*, the Succession to personal Estates of Intestates as it is now in *England*, no Body can deny it to be a Succession as to a Property of the Succeder; which the ancient Laws of the Kingdom allowed no more to Religious on account of Birth-right, or to their Monasteries for them, than what is here strictly called Inheritance, Succession, by the same Right, to the real Estates of deceased.

I say therefore 2dly, That as the Opponent maintains *Discuss. p. 4. Answ. 2. N. 10.* that S, for the same Reason of his pretended Transfer, may inherit Estates real as well as personal, so the Ancient Law against Religious inheriting, holds equally in regard both to real and personal, which will be easily proved by several Authorities of Law, which at the same that they declare no Religious can inherit, give also the Reasons why they cannot. Now, in order to make this out with all Perspicuity; as nothing can be

be stronger in the way of Proof for the Common Law of England on any Case, than the Ancient Form of Writs for the Tryal of such Cases, I will begin with what Mr. B——, p. 15. reports out of L. Coke. *If the Father enters into Religion, then shall his Son and Heir have a Writ of Mortd'ancestor, as if his Ancestor was dead. And the Writ shall give Order to the proper Officer, and say; you shall summon Twelve free and lawful Men to give Verdict upon Oath, if W, the Father of the foresaid A died on such a Day, by taking the Habit of Religion, in which Habit he professed, as is alledged, &c. Tunc summoneas duodecim liberos & legales homines, &c. sacramento recognoscere, si W pater prædicti A, die quo obiit, habitum religionis assumpsit, in quo habitu professus fuit, ut dicitur, &c.* Upon which Writ two Things are to be remark'd, 1mo, That the Enquiry is to be, Whether *W* died by professing in Religion? So that *W* was to be look'd upon as divested by Profession from all Right to the Estate, in as much as he was thereby divested of all Civil Rights, no less than if he were really dead. And this Reason, as is visible, holds equally against all Right after Profession to personal as well as real Effects. 2do. That hereupon not the Monastery of *W*, as his Heir or representing him, was to have the Estate, but *A* the Son still living in the World. But before I make any farther Reflections on this Matter, it will be most proper to hear what Littleton says thereon. *When a Man enters into Religion, says Littleton, Sect. 200. he is dead in Law, and his Son, or next Cozen incontinent shall inherit him, as well as tho' he were dead indeed. And when he enters into Religion he may make his Executors, and they may have an Action of Debt due to him before his Entry into Religion, or any other Action that Executors may have, as if he were dead indeed. And if that he maketh no Executors, when he entereth into Religion, then the Ordinary may commit Administration of his Goods to others, as if he were dead indeed.* All which plainly shews, that the Religious was as much dead for retaining any Property in his personal Goods, or transmitting it by Profession to his Monastery, as he was dead for so having or transmitting a real Estate. And this (notwithstanding what the Opponent has said of the Canon Law giving all to the Monastery, that the Religious had not disposed of before) he very well knows, and frequently owns, is exactly conformable both as to Moveables and Immoveables to the Rule of *S*.

L. Coke, far from opposing or restraining the Doctrine of Littleton, confirms and illustrates it in his Comment thereon, by remarking, that *there is a Death in Deed, and a Death in Law; and that the latter, which is that of a Religious Profest, has the same Effect as the former only in three Cases, none of which relate to our Question, as in none of them any Civil Right is preserved to a Religious.* For the same Distinction of Natural and Civil Death, the Identity of their Effects, and the Civil Death of Religious Profest, more Authorities of English Lawyers may be seen in Mr. B——, p. 14, 15, & seq. and we shall see by and bye, that the way of speaking of the Lawyers of our neighbouring Countries upon the Continent is perfectly the same.

Now, it is plain, that if a Religious was so far dead by Profession, that he thereby lost all Right and Property in Goods moveable or immoveable, of which he was in Possession, he must, *a fortiori*, have been so far dead ever after, as not to be able to acquire for himself any new Property, by Rights which he had before his Profession, but which had not procured him either Possession or Property, and by Profession were extinguished. Secondly, if the Monastery of the Religious could not represent him so as to enjoy the Estate of which he was possessed when he enter'd into Religion, much less could it represent him, as in our Case, so as to succeed to an Estate which never had come to him, and when the Rights by which it might have come to him, were by Profession abolished.

Thus we see that in Catholic Times, there was a particular Disposition of the Law in relation to Religious, and an Uniformity of Judgments agreeable thereunto, by which they were made and declared incapable of inheriting. But if there had been no Record of such Judgments, no Evidence of any particular Law relating to this Subject, it yet seems that the same Rule of Right might have been inferr'd from certain general Maxims of the English Law, and certain Principles of Manners, then acknowledged by All, both Professors and Judges of the Law. For 1mo, Tho' the Law neither of these nor of former Times allow the Transfer of a bare Right without Property, and some sort of Possession, (whence in Sect. II. was drawn an invincible Argument against the Plea of Renunciation in favour of *S*) it yet allows a Release and Remission of such Right; and therefore, it seems, allows to any one to abdicate his Right of Inheritance, whatever it be, and withdrawing himself, to pass it over to him or them, who stand or shall stand next in order of Succession. 2do, At least, as according to the Saying of Bracton, a Classic Author amongst English Lawyers, *Cum quis se religioni semel contulerit, renuntiat omnibus quæ sæculi sunt; Whoever once enters into Religion, renounces to all things that are of the World,*

World, Rights as well as Possessions. As this was then taken to be the Sense of those Evangelical Councils (as it is also at this Time in respect of Particulars) of which Religious were believed very piously and reasonably to undertake the Observance, in order to the serving God, and attending to the Work of their Salvation with greater Freedom; it cannot be doubted but that our Predecessors, Laity as well as Clergy, look'd upon Religious Profession to imply such an Abdication and Renunciation; and that they entirely approved of the same. Add to this, that the Exclusion of Religious from all future Share of the Family Goods is a considerable Advantage to the Civil State, as it is a very great Ease, and in a manner necessary for the Support of the Part remaining in the World. Which Reason may be seen often alledged for this almost general Practice in Catholick Countries.

From all this it is evident, That by the ancient Civil Law of *England, G*, as well as all other Religious, were incapable to inherit a Personal any more than a real Estate: And whereas, so far from any Appearance of there having been a Law empowering Monasteries to inherit what their Religious could not, it has been seen on the contrary, that they were both equally excluded: Therefore, by the same Ancient Civil Law, the Monasteries could never be intitled to such Estates real or personal, which their Religious might have inherited, if they had continued in the World. And accordingly it is notorious that our neighbouring Countries, and others amongst whom the said Principles are received, as have been here laid down from our Ancient Law, upon no account ever admit Religious or their Monasteries to such Estates real or personal, as were not theirs before Profession, but only would have been theirs, if they had not been Religious. And if we in this Country can only give the Rule of Law, but not the like particular Instances of Practice for Ancient Times, the Reason is obvious: Because those Times are so Ancient, and now elapsed above two hundred Years.

To what has been here argued, it has been objected long since, and the Answer *L* again takes it up, making thereof one of its three Parts, that the Ancient Law concerning the Disability of Religious to inherit, regarded only such Religious as had been Profest within the Kingdom; as appears from *1 Inst. 132. L. Coke.* Now it is not contended that *G* was Profest in any Religious House within the Kingdom. Therefore.

Answer 1mo, If this proved any thing, it would prove too much, even according to the Judgment of my Adversaries; at least it would prove that of which they can by no means avail themselves. For from hence would equally follow, that by the Law of *England* in Ancient Times Religious Profest abroad were capable of enjoying Lands or Monies, as their own Property, and even of marrying. Now, if the Ancient Law of *England* can be construed to have permitted both, there are other Laws, by which *S* owns itself to be bound, which it will not pretend to have ever allow'd of either. But you will say, *G* might so far have been benefited by this Law, as to take, and then suffer the Estate to go to his Body. Answer. By the Law of *England* it could not go to his Body, unless he had first taken it as his own Property, and then made it over to *S*. For what Pretext can be alledged for its skipping from *T* to *S*? Instances there are of something like, tho' not in the way of Inheritance, in favour of the Crown, but none in favour of Religious Bodies. Now the Opponent *p. 429* expressly owns (for which he cites many Authorities) that it would be contrary to Religious Vows for an Estate to be first taken and appropriated by a private Religious, and so transmitted to his Monastery.

2do, This mighty Objection, as to our Purpose of determining the Right, will appear just nothing at all to any one who will reflect what happens every Day in Tryals by any Law whatsoever; which is expressed in the Civil Law by this sort of Adage; *Jus adest, sed deficit probatio; Right there is, but Proof is wanting.* Whence immediately occurs that two sorts of Law must be distinguished; *Law for Property, and Law for Proof.* If, for Example, a Man has lent Money without either Witness or Writing, he is not intitled to it by the Law of Proof, and will be justly cast if he sues for the Sum lent; but his Title is not the worse according to the Law of Right and Property, by which every one ought to receive back what he has lent, and every one is obliged to repay what he has borrow'd. In the same Manner, if one denies himself to be a Profest Religious, and there be no Evidence that he is one, or what comes to the same thing, if, according to the Laws of Proof required in some Court, there be no such Evidence as can be attended to, the Court in such Defect of Evidence cannot judge him to lie under those Disabilities, which Religious lie under: Yet, if he had really been Profest, his Disabilities, according to the Law of Right and Property, would be still the same as those of other Religious. And he or they would be look'd upon as very ill Men, who being conscious that the Law on which

Right

Right and Property depends is against them, would seize or detain any thing, because it could not be held or forced from them for want of the Evidence required by the Law of Proof. Supposing therefore the Law for Proof as to the Profession of Religious to have been such as L. Coke lays it down, it would follow indeed, that if the Fact was denied, which no body denies, that G lived and died a Profest Religious, it could not be proved at Common Law: But it would no ways follow, what is the Point in Question, that, supposing him to have been Profest, he was yet able, according to the Laws of Right and Property, to inherit; and as little, that those, who knew and own'd him to have been Profest, could with a clear Conscience, and without wronging their own Reputation, build upon the Title of his having inherited. That the Chief Justice meant no more to deny the Disabilities of a Religious Profest abroad, than he would have excused the Debtor in the foregoing Example from an Obligation to repay, may be gathered from the Words he makes Use of: *The Profession cannot be made out according to the Rules of Law, there wanteth the proper Certificate, there wanteth Tryal. The Law does not so much as take Knowledge of Foreign Professions.* For these Expressions may every one be most properly apply'd to the said Example. *According to the Rules of Law a Debt cannot be made out by the meer Affirmation or Oath of the Creditor, there wanteth proper Evidence, there wanteth Tryal, the Law does not so much as take Knowledge or lend an Ear to Pretensions of Debt without a written Acknowledgment, or living Witness.*

Again, that this is the whole Meaning of the Authority produced, appears from the very Reason on which the Disability of Religious is founded; which is, that they have renounc'd the World. Now, can it be said, that a Man has less renounc'd the World, because he was Profest, and made his Renunciation in a foreign Country? When it has so happened, I own indeed it may not be so easy to prove the Fact to the Satisfaction of a Civil Court at home, and therefore it may have been a Rule with some such, not to exert their Power in the like Case, as if the Fact were duly proved, but to leave the Party to his own Conscience, and the Correction of his Religious and Ecclesiastical Superiors. But this is no ways contrary to the Law's remaining in its full Force, which disabled all Religious from marrying and inheriting; and which would have had its full Execution, if the Fact had been sufficiently proved. Wherefore, in our Case, the Religious Profession of G, tho' made abroad, being uncontested, and uncontestable, 'tis according to our Ancient Law, in all respects, both as to its directive and executory Part, that G should be look'd upon, and dealt with, as unable to inherit.

One other Thing also is very observable, of which both Mr. B——, and *Answer L* take notice, that a very learned Civilian, Dr. Strahan, thinks it strange, and therefore perhaps doubtful, that it should have been a Rule in the Common Law, not to admit of any Evidence of Foreign Profession. For such Professions have been always so notorious, and still more since the Council of Trent, that the most scrupulous Persons might be satisfied of the Truth of the Fact. Whence many are apt to think, that a Court of Equity would not now refuse such a Fact to be proved. But whatever be the Law of Proof, now or heretofore, 'tis still most evident, that the Law of Right, as it was in Catholic Times, was absolutely against any Religious inheriting, whether Profest at home or abroad. And it is the Law of Right which all concern'd in the present Controversy profess to be guided by; which indeed the Rules of good Conscience require on all Occasions, when this Law evidently appears; but much more in such a Cause as this, which upon many Accounts cannot well be brought before a Regular Court of Justice.

From what has been here observed, it appears also, That the Axiom, *Where is no Remedy, there is no Right*, is no less abused on this Occasion, than L. Coke's Authority. Where, indeed, the Law prescribes no Remedy, there, if you will, let there be no Right: But tho' the Remedy prescribed by Law cannot be obtained, for want of Proof, there may be, and are Instances every Day, of Rights at the same Time most certain. To all which must be added, that tho', as to Religious Profession, and its Consequences, the mere want of Proof should have formerly altered the Case of Right and Wrong, which yet is a gross Absurdity, some very good Considerations may be seen in the first of the three Copies of Mr. B——, upon which, such a Pretence must be look'd upon as still more absurd in the Circumstances of our Case, and in Relation to G's having been Profest in a Religious House beyond Seas.

Refutations.

Answer L. What there is particular in this Answer is, that *L* suggests and endeavours to make out a new Plea in favour of *S*, quite different from any Thing the Opponent had ever pretended before, which yet this latter seems to like so well, or to be so sick of his own, tho' he still pretends to maintain it, as being that in Fashion amongst his Friends, that, as has been remark'd *P. 12.* he has sometimes Recourse to the new one, when he finds himself hard prest upon the other, and in all Appearance if the Dispute was to last much longer, he would drop this other, tho' 'tis already the second at least he has made use of, and leaving those of another Gown, seek to shelter himself under that of *L*. However, the new Plea is this, that tho' *G* might be unable to inherit, or take any Thing as his own Property, he was yet entitled by the ancient Law to take the Personal Estate of *T*, as his next of Kin Administrator, either for the Benefit of his House or Body, or by the Assent of his Sovereign to dispose thereof for Charitable Uses. The Arguments by which *L* goes about to maintain this Plea are reduceable to these three Heads, because, First, a Religious Man was capable of being Administrator. Secondly, He was not only capable of, but if next a-kin, had a Right to demand the Office of Administrator. Thirdly, After obtaining Letters of Administration, and Payment of Debts he was accountable to Nobody, unless perhaps his own Regular Superiors, for the Disposal of any Surplus that might Remain. Besides the Arguments which he brings as direct Proofs of these Articles, he also advances some other Things, in order to favour the Plea he would establish, and make it appear less strange and out of the way. To all these I will here answer, beginning first with the three Articles.

But before I examine the Arguments brought for the said Articles, I must take notice, that tho' they contained nothing but the Truth, they could be of no Service to *S*. For to make good the Cause of *S* from *G*'s supposed Right to administer, it must be proved that *G* could not only take the Personal Estate of Intestate *T*, as Administrator *in autre Droit*, as was the Way formerly for the next of Kin to take it, but could take under the Statute of Distribution, that is by Inheritance, or at least as his own Property; for so Estates are taken under that Statute. At least, I say, as his own Property, which is evident, because by the said Statute one next a Kin has the Property of the Estate even before he has taken out Letters of Administration necessary for obtaining Possession, and should he die before taking them out, this Property would go to his Executor, or Administrator. Now 'tis agreed *G* could take nothing as his own Property. Secondly, considering ancient Times, and supposing *G* to have then lived under the Rule of *S*, he could not for this other Reason have demanded Administration such as *L* pretends it to have then been, because such Administration would have been equivalent to Inheritance, procuring the very same temporal Advantages to *S*, by Reason of its Profest Member, and the same Disadvantages to other People, as if *S* inherited by Reason of its Member; in a word thus *S* would have been properly said to succeed to *T*'s Estate by Reason of *G*, of which *S* is formally declared incapable by its Constitutions. And therefore according to that Rule both of the Canon Law and Common Sense mention'd *P. 28.* what is forbid one Way is not to be let in another, *G* could no more have demanded such an Administration, then *S* succeed by Reason of *G*. To proceed now to the three Articles.

As to the First I have no dispute with *L*; so let it be agreed, that a Religious Man might in Ancient Times have been chosen Administrator by the Ordinary, on account of his known Probity, and extraordinary Ability and Fitness to discharge the Office.

As to the Second in which he pretends that the Religious being next a-kin had a Right to demand Administration we must begin to disagree. And for the clearing up this Matter we must distinguish different Stages of Time, the 1st ending at 21 *Ed. 3.* the 2d at 22 *Hen. 8.* the 3d at his assuming the Supremacy *anno Regni 26.* or if you will at the final Dissolution of Monasteries, about *anno 28.* Now it appears that the first Notion that was entertained about the way of disposing of the Goods of Intestates, was (even without any Provision in the Law for Payment of Debts till *Ed. 1.*) that they should go to pious Uses *pro bono animæ* of the Deceased, And in these early Days the whole Distribution was made by the Diocesan, or his Orders; so that in this first Stage, which lasted till within little more than 100 Years of the Days of *Hen. 8th*, no Religious nor even any Kinsman could demand a Share in the Administration of such Effects. Then came the Act of 31 *Ed. 3d*, when the Law began to attend to

another Consideration, suitable to the Practice of most other Countries, to wit, that the Distribution of these Effects should be made by some of the Friends or Kindred of the deceas'd, and perhaps that the Family, principally, should be benefited by them: But during this second Stage, which lasted till the Days of *Hen. 8th.* it was left to the Discretion of the Ordinary to chuse amongst the next Friends and Kindred, whom he pleased for Administrator, and therefore neither Religious nor any determinate Person of the Kindred had Right to demand Administration. At last came the Statute 21 *Hen. 8th.* by which the Ordinary was obliged to chuse the Widow, or otherwise one in the very next Degree of Kindred. This Statute was not enacted above four or five Years before the Expiration of what we call Antient Times, which ended with *Henry's* assuming the Ecclesiastical Supremacy. But if we suppose this Stage to have continued till about ten Years afterwards, when the Monasteries were dissolved, it is plain that even in this Time no Religious could demand Administration. For whoever knows any Thing of Monastick Discipline as it was then, and still is amongst Catholics, see the *Canon Placuit Caus. 16. 9. (xviii.)* cannot be ignorant that no Religious has such a Right to be admitted into the Management of secular Affairs, as to challenge as his Due to be made Administrator or Executor. Much less can this be thought of such a one as *G*, who, at the Death of *T*, was by Sickness so worn out both in Mind and Body that he was quite unfit for the Office of Administrator, and, as was expected, died in a very few Weeks after *T*. Besides it is a fixed Principle that Religious by their solemn Profession, are deprived of all Civil Rights. Now tho' Administration, or Executorship do not necessarily imply a Civil Right, as they may wholly regard the Interest of others, and be *in autre droit*, yet a Right to demand them from Proximity of Blood would be a Civil Right: Just as Slaves formerly might inherit, when made Heirs by a voluntary Institution, because they might inherit for their Masters, but they could not on account of Kindred demand any Inheritance, because this would have argued a Civil Right in themselves. And thus tho' an Outlaw or Person attainted may be Administrator, *L. p. 5.* does not disown that neither have a Right to demand it.—— Now if we proceed even to a fourth Stage from 31 *Hen. 8.* to 22 *Car. 2.* we shall find that Religious such as *G* could by the Law of *England* have no more Right during that Space than in the former, because no new Rights, as will be seen in the next Part of this Section, were given by Law to any Religious, but Departers or Deraigned; of neither of which kinds was *G*.

As to the third Article since it has been proved that *G* in Antient Times could have had no manner of Right to demand Administration upon any Terms, much less could he have demanded it so as not to be accountable. But we may further consider that if in Catholick Days a Religious had been chosen Administrator, it is altogether improbable (and at this Distance of Time we must take up with Probabilities) that he should not be under some Direction of the Ordinary how to dispose of a Surplusage. For if the first of the abovemention'd Ways was attended to by Law or Custom, *viz. pro bona animæ* it is not likely that the Ordinary would chuse a Religious Administrator, without some good Assurance that the whole Surplus should not be engrossed by his one Monastery; and if the second Way of Disposal was considered, *viz. for the Benefit of the Family of the Deceased*, it is as unlikely that he should not require Security, that the Whole should not go to the Religious Administrator, or on his Account to the Body to whom he belong'd, since the Religious was look'd upon as abdicated, estranged, and quite taken out of the Family.

Upon the Second Article, where we begin to disagree, *L* alledges *p. 4.* that a Religious was never look'd upon to be *civilly dead*; with Regard to his Capacity of being Administrator.

Refut. If he was not dead in regard to a Capacity, he was so in regard to a Right. Whence perhaps till the Dissolution of Monasteries the Ordinary might have chosen a Religious to be Administrator; but none Protest could claim it, consequently it cannot be affirmed that *G* in ancient Times would have so succeeded to the Estate of *T*. And in these later Times, since the Statute of *Car. II.* none can be Administrator but he who has a Right to claim it, as being one of those who have a Property in a distributory Share, or some one allow'd by them.

Id. The antient Statutes appointing who shall administer for Intestates, as well as the Modern, determine this Matter by the next Degree of Kindred, without any Exception of Religious. Therefore the same Statutes extend also to these and give them a Right equally with other People.

Refut. The Consequence is ill drawn, as it would be in Relation to Outlaws and Attainted, who may be the very next a-kin, and are not excepted in the Statutes.

P. 5. 'Tis affirmed meerly *gratis*, and no ways proved that Religious were under a Disability.

Refut.

Refut. 'Tis not proved, nor affirmed that they were under a Disability of exercising Administration *in autre droit*, no more than of Outlaws or Attainted: But as it is proved of these that they have no Right to demand it, so the same is proved of Religious and of all Kinds for this same Reason, that all are destitute of Civil Rights.

Ib. p. 6. Upon the third Article it is alledged, that before the Statute of Distributions an Administrator was not compellable to distribute, and after Administration granted, the Ordinary having *functus officio*, perform'd all his Office, his Hands were closed, and he had nothing more to do.

Refut. I suppose the Hands of the Ordinary are said to have been closed meerly with Relation to a Distribution of the Surplus. For the Statute, by expresse Terms, leaves them open, for causing Payment of Debts. I suppose also, from the Authorities cited, that the mentioned Practice of the Courts of *Westminster* opposing all Account to the Ordinary of Distribution, relates to the Time betwixt 21 *Hen.* 8. and 22 *Car.* II. Now this being so, the Fact alledged makes nothing on many Accounts for the third Article. 1. Because it has been proved that G neither in that Stage, nor in any preceeding could demand to be made Administrator on any Terms, whatever others might have demanded. 2. This Practice does not regard the ancient Times which are meant in the Article. 3. A Law is not immediately abrogated, because one Court will not help, but rather will obstruct another in the Execution of that Part of Justice with which this other had usually been charged. It was not certain therefore, from the Law of the Land, a Judgment upon Part of which belong'd to the Spiritual Courts, that the Administrator was not obliged to give a satisfactory Account to the Ordinary, because the Courts of *Westminster* would not compel him to it. 4. 'Tis very visible that from the Days of *Hen.* VIII. the Succession to the personal Estates of Intestates was running apace into the Way of Inheritance, into which it was at last put by the Statute of Distributions. But since it is not disown'd that till that Time the Spiritual Courts pretended to have a Power to inspect and direct the Distribution of any Surplusage, this is a great Proof that in more ancient Times they really enjoy'd it.

It now only remains, as to this first Part, to speak to some particular Assertions advanced by L, with a View to render less wonderful his Paradox of a *quondam* Family Right in Religious to an uncontrollable Administration; which Assertions, even when true, will be found to be of no manner of Service for proving or giving any Colour of Truth to what is intended.

Ib. p. 3. *A Religious House might take by or through its Member, tho' he himself generally was incapable of having any Property to his own Use distinct from the Body.*

Refut. Yes, as a Master might take by and through his Slave, when the Title for the Slave to take arose from the Relation he bore to his Master. So a House might take what its Member as an Instrument belonging to the House should earn by its Labour. So it might take what was given to the Monk, as into a Hand belonging to the Body. But, so, the House could not inherit, because Right of Inheritance arises from no Relation betwixt the Religious Body and its Member, and is quite extinguished by Profession; and for the same Reasons neither was a Monastery absolutely entitled to the Gains of a lucrative Administration; tho' if this Administration was voluntarily conferr'd on its Member, whatever was got by it would go to the Body.

P. 2. *A Monk might sue jointly with his Sovereign.*

Refut. What Name was to be made use of in a Suit must be look'd upon to have been a Piece of meer Formality, it being then agreed on that the Property of the Thing recovered would be in the House or Sovereign, so that no Civil Right could be thence inferr'd to be in the Monk. But here in *England* the Law was so averse to any Appearance of Civil Right in a private Religious, that there is no Mark of a Suit having been allow'd in the Name directly of any such; and accordingly the Statute of 31 *Hen.* VIII. restoring deraigned or departing Religious to several Civil Rights, is call'd an Act enabling them to sue and be sued.

Ib. *A Suit might have been on a Writ for Reparation of Damage done to Abbot and Monk propter dampnum ipsorum: in which Case both would sue, and both recover Damages.*

Refut. And so a Suit might have been for Damage done to the Abbot, and to the Walls of his Monastery, and yet the like Consequence could not be thence drawn.

Ibid. p. 3. A certain old Law Book call'd *Mirroure* says, *Des biens des gens de religion appent l'action al chiefe en son nosme pour luy & son convent. Actions concerning the Goods of Religious belong to the Chief or Sovereign in his own Name, and that of his Convent.*

Refut. This Passage makes directly against *L.* for *Chief* or *Sovereign* is counter-distinguished to *private Religious*, and denotes the Superior in his publick Capacity, and as representing his House; To which Superior the Text says all Action belongs, about the Goods and Interests of the House.

Ib. A Monk might have been Farmer for the King, and had his Action for what concerned his Farm; and if there was an Overplus, after Rent paid, would have acquired so much for his House.

Refut. His Action as being for the Concerns of the King's Farm was visibly not in his own private, but in the King's Right; and it is as visible that the Overplus not having been gained by Cognation or Alliance in Blood, or any other private Civil Right, but by an Industry whose Fruit belonged to the Monastery, might be acquired for it.

Ib. A Monk becoming Bishop might have had an Action concerning his Bishoprick, and all Overplus of his Expences would be acquired for his Monastery.

Refut. A Bishop is one in publick Office, reckoned among the Chiefs and Sovereigns. But *L.* is mistaken when he says the Overplus of his Expences would have been acquired for his Monastery. No, according to the Canons it would not indeed have become his private Property, because he is still reckon'd under the Obligation of his Vow of Poverty, but would have been acquired for his Church and Diocese, of which who has a Mind to see more, let him consult *Lessius de Jure & Justitia*, L. 2. Cap. 41. Dub. 11.

Ib. A Monk might have been made Executor, and all Overplus after Payment of Debts would have been acquired by him for his Monastery.

Refut. Suppose the Word *Executor* be taken to signify the very same Thing which we now commonly understand by *Executor*; to wit, an Heir by voluntary Institution and Choice to a whole personal Estate, a Monk no more than a Slave by being so instituted would have acquired by any private Civil Right, as is that of Inheritance or any other Claim from Nearness of Blood, and without any such the one might have taken for his Monastery, and the other for his Master.——But secondly, When the Decretals in the Title *de Testamentis* approve of Religious being made Executors, they do not seem to mean such an universal but only a particular Executor, little more than a Legatee in Trust, for some pious Use. For the Decretals must be thought to speak relatively to the Civil Law. Now it was only for this Purpose that the latter brought in the Office of Executors, whilst others were Heirs, and inherited the gross of the Estate, and all Overplus after Payment of Debts. 'Tis to *Leg. 28. Cod. Tit. de Episcopis & Clericis*, as *Cowell* remarks *verbo Executor* that the Institution of Executors is owing; in which Law those that thought good by their Wills to bestow any Thing upon good and godly Uses were permitted to appoint whom they pleased to see the same performed. And hence he adds, in his *Opinion Time and Experience have wrought out our universal Executors*. But however that may be, it scarce seems credible, that our Law ever allow'd private Religious to be more than particular Executors for a Pious or at most some special Use, especially if none was left residuary Legatee, and there was likelihood of an Overplus. For since the Law would not allow such to have the Name and Appearance of being intitled to any Thing for Debt or Damage, how much less could it approve their having the Appearance of a Property in an Overplus perhaps very considerable?

PART II.

Of the Law of England in its present State, as to the Succession of Religious.

I Come now to the State of the Law since the Change of the national Religion; which modern State I think may be maintained according to the Maxims of Lawyers of all Persuasions so far to agree with the Ancient, that it still leaves all Religious incapable to inherit, excepting those who as the *French* say *ont jetté le Froc*, that is renounc'd their Profession. This I shall undertake to prove; not that it is necessary for the Cause I have in hand; because it would be no wonder, if after so great a Change, some Laws had been made directly contrary to the Tenets of the old Religion, and Practices grounded thereon, as some such have been really enacted, with respect to Religious Profession; for Example, that all Deraigned or Departers Profest before the Age of one and twenty might marry: But that it may very likely be of Satisfaction to the Reader, to see the whole Matter put in its true Light, and to find that our present Laws still square with the Ancient as to those of the Religious who stick to their Profession: So that our Cause try'd according to the Law in either of its States, and supposing the

Matter of Fact as agreed on all sides, that G at the Death of T was a Religious persisting in his Religion, would most certainly be carried in a Court either Catholick or Protestant.

The chief Difficulties on this Head, but which may only furnish a better Occasion of explaining the Matter, are comprized in a Saying of L. Chief Justice Roll's *Abridg.* 2d vol. fol. 43. "If an Englishman goes into France, and there becomes a Monk, he is notwithstanding capable of a Grant in England, for that such Profession is not tryable; and also for that all Profession is taken away by the Statute; and by our Religion now received such Vows and Professions are held void. I have heard, says he, that this was in 44 Eliz. in one Ley's Case resolved accordingly by all the Justices in Serjeant's Inn."

Besides the Hearsay at the End, three Motives are here alledged for a Religious being now allow'd to be capable of a Grant. The 1st, That Profession is not tryable. The 2d, That Profession is repealed by Statute. The 3d, That by the Protestant Religion it is held void. To the 1st of those Difficulties I have spoke already. To the 3d I will speak by and by.

Now to the 2d, This may and must be judged of, by consulting our Statutes; and the only ones directly relating to this Matter, and by which it must be determined are (x) 31 Henry VIII. C. 6. An Act enabling Religious to sue and be sued; and another (xi) Ed. 5 and 6. C. 18. in further Confirmation and Explanation of the former, both which may be seen at length at the End of this Treatise. That of Hen. VIII. was made after the Dissolution of all Monasteries, little and great; and much more that of Edward VI. Wherefore both of them relate to Religious in the very same Circumstances, which they are now in; and I maintain that neither gives the least Intimation that universally, and upon all Occasions no notice is to be taken of Profession, but both declare the contrary in Words as exprefs as can be used.

For 1st, it is plain from the Text, that the Allowances of this Statute are only to two Sorts of Religious, the one called *deraigned*, the other *departing from their Religion*. The Statute itself defines what it means by *deraigned*, who, it says, are those *who are set at Liberty by Reason of Suppression, dissolving, forfeiting, or rendering their Monasteries*. The Departers from their Religion (by which I readily admit are meant some others than the former, tho' the Statute does not expressly say it) are those who have renounc'd Subjection to their Religious Superiors, and hold themselves free from the Obligation of their Vows. Now there may be Religious who are neither *deraigned* in the Sense which the Act has given to this Word, nor Departers, which the Act itself signifies, by giving Order about such. And G was undoubtedly neither of these: not *deraigned* since his Monastery beyond Seas has neither been suppressed nor dissolved, nor forfeited, nor render'd: Not a *Departer* since he liv'd and died in a zealous Adherence to his Vows and Profession. Therefore by the said Statute no Exemption can be claim'd for him from the ancient Laws.

'Tis so certain that the Allowances then made to Religious were not extended to all without Exception, that at every Clause of the said Act, excepting the first in which the *Deraigned* only are mention'd, 'tis constantly repeated that the Liberty thereby granted is for the said *Deraigned* or *Departers*, nor is ever any Expression used more universal; and one Clause which makes most to the present Question, excepts in exprefs Terms, those who are not *Deraigned* or *Departers*. The Clauses of the Act of Henry are five, three positive, and the two last negative. The 1st that *deraigned* may purchase: The 2d that *Deraigned* or *Departers* may sue and be sued: The 3d that they may take any Thing that falls to them after *Deraignment*, or *Departure*. The 4th that *no Religious Persons shall or may at any Time hereafter be taken, deem'd, or judged for as Heir, or Heirs, or inheritable to any Person or Persons, to any Purpose, Respect, or Construction, or Interest in the Law, nor that they nor any of them by virtue of this Act be received, admitted, or deem'd able in the Law, to demand, challenge, receive, or take any Manours, Lands, Tenements, or Hereditaments, or any other Thing, or Things by Reason, or for any former Title, Right, Interest, Matter or Cause had, made, done, or grown to any Respect, or Purpose before the said several Deraignments or Departings out of their Religion*. The 5th that no Religious Persons being Priests, or such as have avowed Religion at one and twenty Years of Age, or above, be enabled by that Act to marry, and that they and every of them be clearly excluded and put from the same. — The Statute of Ed. 6. contains chiefly an Explication of the third Clause, and a clearer Declaration that *Deraigned* and *Departers* may *Inherit* after their *Deraignments* or *Departures* upon the Titles that they shall then have, to which is join'd a Repetition and Confirmation of the Fourth. And from the said fourth Clause extant in both Statutes it plainly appears, that these so far from universally taking away the Incapacity of Religious to inherit, establish'd by the Antient Law, Re-enact and Confirm it in the most ample and exprefs Manner for any Time preceding *Deraignment*

raignment or Departure, neither of which I am sure will or can be attributed to G. Whence and also from the fifth Clause of the Statute of *Henry*, which excludes from marrying all Religious even Deraigned or Departers who were Profest after the Age of one and twenty; it appears no less that all was not taken away by Statute, that was held anciently as a Consequence of Profession, tho' I believe Custom soon did for some, what no Statute had done, and made the Law of Celibacy for Religious be look'd upon as obsolete, with Respect to the Deraigned, and Departers, as the Law of Poverty.

As to the third Consideration brought by *Rolls*, viz. that by the Religion now received such Professions and Vows are held void. Let it be so. But it no ways follows from thence that the Professors of the Received Religion have therefore thought fit to take away from all Religious, the Civil as well as Monastical Restraints and Disabilities which they before lay Under. Nay the Contrary appears very plain in the now mention'd Statutes. And the Reasons of such Proceeding are obvious. For it was a Piece of Humanity to allow the Rights of Purchase and Inheritance to the *Deraigned* that they might not be deprived of all means of Subsistence, and left to starve after being turn'd out of their Houses, and a very plentiful Provision from the Estates thereto belonging. There was still greater Reason according to their Principles, why they should make the same and greater Allowances to *Departers*: Because these as joining in with the Reformation were thought to deserve all Encouragement, especially by Indulgences conformable to the Reformed Spirit, which is directly opposite to every one of the Religious Vows, and by this Means more were likely to be drawn over into the like reformed way of thinking. But they were far from having the same Motives and Inclination, to shew singular Favour and afford new temporal Advantages to Religious who were of a quite contrary Mind, and resolved to abide by it, and continue in the State of Life which was reprov'd. Every one knows in what manner many of them were treated, who would not swerve from their Religious Constitutions, and voluntarily surrender their Monasteries. But 'tis most unlikely of all that any favour should be granted them as to Right of Inheritance, since it could not be granted but at the Expence of those of the received Religion, or at least of Lay Persons, who, of whatsoever Persuasion, were much less obnoxious to the reigning Humour of the Times, than Religious sticking to their Profession.

From the foregoing Observations it appears what in all Probability must be the Meaning of the the Hearsay mention'd by *Rolls*, if true, as very possibly it may, that Judges met together in the Reign of Queen *Elizabeth* agreed, that an Estate was grantable to, or inheritable by a Religious. For it must be concluded that they meant only to speak of such a one as had been Deraigned or had Departed from his Religion; for whose taking a Grant or inheriting an Estate, both Statute and the Reformation directly make. For others these Reasons make nothing, but on the contrary against them, and indeed it is not likely that in the Reign of Queen *Elizabeth* any Religious sticking to his Profession, would have ever gone to Law for a Grant of Lands or an Inheritance.

Refutations.

Answer L. p. 9. L is very earnest to make out that the Acts of Parliament dissolving Monasteries, took away by Implication all subsequent Profession, that is, *disallow'd it, and made it to be no longer a Band for forming a Corporation*, for which he thus expresses his Reason. *Because otherwise why were Monasteries dissolved and surrender'd and the Members thereof Deraigned.*

Refut. 'Tis of very little Moment to our Dispute, whether or no the said Acts condemn'd all subsequent Profession, provided that they did not take off the Civil Restraints which it formerly brought on, which we have proved that they no ways took off. Nevertheless there is no Appearance that they condemned or took away all subsequent Profession. For the greater Monasteries were not dissolved by Statute, but by forfeit, or surrender, the Statute only coming on afterwards for applying their Revenue to the King's Majesty. A further Sign that Religious Profession was not taken away by Statute, is the Foundation that was afterwards made by Queen *Mary* of new Monasteries, or Re-establishment of old ones, for which it does not appear the Repeal of any former Act was thought necessary. To the Interrogation made by L why therefore were Monasteries destroyed, I shall not pretend to give an Answer, but he may have one from several Protestant Writers who will plainly tell him that the Reason was no other, than that the King and Courtiers might get Money and Plunder, who for the same Reason might not have been sorry that new ones were erected, that they might have dealt with them after the same Manner.

Ib. 'Tis

Ib. 'Tis allow'd that a Religious may now take a Legacy. *Why then may he not take a Statute Legacy, as in several Authorities the Distributive Right, or Interest of Persons claiming under the Statute of Distributions is said to be, such Right or Interest having all the Qualities of a Legacy?*

Refut. Upon the Query here put, I shall observe 1^{mo}, That we do not allow that the bequeathing a Legacy to a Private Religious was according to the Methods of the Law of ancient Times, or would then have given any Right either to the Religious, or his Sovereign, no more than it would now in *France*, much less that any such Right according to our Law, as it stands at present, and is express in the Statute 31 *Hen.* 8. would accrue from a Bequest to a Religious not deraigned or departed. For this Statute makes all such Religious as incapable of acquiring to any Intent or Purpose, as if they were outlaw'd or attainted. But we willingly own that by a certain Equity admitted by *R. Catholics* amongst themselves on account of their Circumstances in this Kingdom, which otherwise would render fruitless many Intentions which they think laudable and pious, a Right may be thus acquired to a Sovereign or Community, and in like manner that Religious tho' otherwise incapable of making a Will may *servatis servandis* so dispose of what belongs to their Body, which upon the same Equity is to be attended to. Therefore *S.* has not the least Colour for giving out (which yet in *S.* must be a most unconscientious Shift to fly to) that its Pretensions are conformable to some present Anticatho-Law of the Land.

I observe 2^{dly}, That if Distribution by the Statute has some Resemblance with a Legacy, inasmuch as the Law has ordered this Distribution so to be made, as it was most reasonable to presume the Deceased himself would have appointed it, if he had made a Will, it has yet a very essential Difference, which is, that a Right by Legacy proceeds from the meer good Will and Pleasure of the Testator, by which Sort of Rights one may acquire for another, as a Slave for his Master. But a Right under the Statute proceeds from Alliance in Blood, which, if any, is a Civil Right, of which consequently all Religious are deprived, and by which none can be said to acquire for his Body as Instrument or Member, it arising from nothing that has a Relation to the Community. And hence it follows that whatever may be said in regard of true Legacies there is not the least Glimpse of Equity for allowing to Religious, under Pretence of Legacy, the Estates of their intestate Kindred; because this in Effect would be making them Heirs, and take by Birth-right for themselves or Monasteries the Estates of such Kindred, which is directly contrary to the Intent of a number of Laws, Ecclesiastical and Civil, Catholick and Protestant, most of them still more express against *S.*, than against the greatest Part of other Religious.

I observe 3^{dly}, that weak and untenable as is this Plea of Legacy, the Opponent seems to adopt it in his last Answer, p. 10. Whence it may be well said, that if he has not one good Plea by which he can abide, no body at least can have a greater Variety of bad ones; of which we may now reckon no less than five. In his *Deduction* the *Justinian Law* and *Canon of the Council of Trent*, to all Benefit from either of which he has since declared he had no Pretence. In the *Discussion* and greatest Part of this third Answer *Renunciation in favour of, or a fruitless, lawless Transfer to S.*; and in some Places of this same Answer *Administration*, contrary to the Meaning of all Law ancient and modern, for no Benefit to the deceased or his Family, but meerly to the Profit of *S.*, and a Legacy from one who made no Will, and so far from presumable, that the Presumption would be defeating the most sacred Laws of Church and State. No surer Mark of a bad Cause than such continual Shifting and Variation. Let *S.* also reflect how it would look on Capuchines or Observantines, who should set up such Pleas of Administration or Legacy; and yet they might do it upon the very same Grounds brought by *L.*, and so greedily embrac'd by *S.*

Ib. p. 8. *As Religious Bodies in a Corporate Capacity, can't at this Time by the Laws of the Realm take Lands or Goods by Purchase, Devise, or Gift, it seems necessary that the individual Members should take for the Benefit of the whole Body, or otherwise how would they subsist, if they were not capable of Acquisitions. This is rather to be considered as an Exchange in lieu and stead of the former Method of taking, which most of the Religious had in their Corporate Capacity.*

Refut. There are Ways, according to what has been before remark'd of a certain Catholick Equity, in which Religious may be relieved by Purchase, Devise, or Gift, either directly in Favour of their Body Corporate, or in Favour of Particulars for their Body; and by these Means some Bodies have

have throve, and may yet thrive well enough. But this admitted Equity no ways proves that either Particulars for the Body, or the Body by Reason of Particulars ought also to inherit, what these would have inherited, if they had continued in the World, which was never allow'd in *England*, at least since the Conquest, to any Religious, and is at this present disallow'd to all Religious, I may venture to say, in most Catholick States. Much less what is said by *L*, *how else could they subsist*; is any Proof that any of these Ways for their Subsistence are according to the present Laws of the Realm, or the Equity of its Courts of Judicature; unless it could be proved that the Law-givers are in Pain, whether Religious subsist or no, or did not even wish that they were all exterminated. For my Part I could heartily wish that our Masters would put on towards them such Sentiments of Indulgence, as to make some Amends for the many Advantages, which it has been call'd Reformation to deprive them of: Tho' indeed I would not have these Amends made by the giving them Rights which they never had, and giving them at the Expence, and to the great Detriment of the Noble, but poor and reduc'd Laity of the same Persuasion, But the Truth is, no Marks can be perceived of a Tendency to Indulgence towards Cath. Religious or Ecclesiasticks of any kind. Besides it is not to be thought, if by the Legislature it were offer'd to *S* to have a Right of inheriting, what its Religious would have inherited by their Birth-right, had they remain'd in the World, that *S* would accept from it such an Indulgence: Since, as the Opponent pretends, it might have had this same from the Canon and Civil Law which yet it has refused, and still refuses.

Ib. It is very material to observe, that *S* was not in Being at the Reformation,——and therefore not obliged to submit to the quondam Laws of the Country.

Refut. I cannot better answer this Objection, than in the Words of the Author of the Appendix to Mr. *B*——'s Third Copy. I have often heard that Persons could not be guilty by a Law made after the Fact was committed: But it is strange that any Body of Men should pretend to be exempt from prior Laws made to restrain the Power of all such: I may add still more strange, that they should pretend to be exempt from these Laws, when since the Establishment of the Body they have been confirmed with particular Relation to it, by Authorities which they themselves acknowledge to be the most respectable on Earth.



A P P E N D I X.

Proving that the Heirs or next of Kin of G, being his Nephews and Nieces, have no Right to the personal Estate of Intestate T, preferably to others in an equal Degree of Kindred to the same T.

FROM what has been treated in the Preceding Sections, the Answer may be deduced to another Query, which makes Part of the Controversy about the Personal Estate of T, viz. Whether tho' G could not take for himself or for S, he might not and did not take and inherit for his own next Heirs, or of Kin, preferably to others who were equally of Kin to the Intestate: so that his said Heirs became thereby intitled to T's whole Personal Estate.

The Answer, I say, must be in the Negative, and this will plainly appear if the Matter be set in its true Light. For which Purpose, we must first lay down some consistent and clear Notion of what is meant by a Person's taking and inheriting for another what he cannot take and inherit for himself. Now the Meaning of this, as is agreed between the Opponent and the Advocate conformably to the Notions universally received amongst Lawyers, as may be seen p. 15. is, that a Person takes for another, when he is the *Means* or *Occasion* of another's taking. First, he is most properly said to take for another, when by some Act or Deed he is the *Means* by which another acquires, when, tho' he has lost all Civil Right, and is civilly dead as to himself, he is become an Appurtenance, an Instrument, and in moral Estimation a Part of some single or corporate Person who is endow'd with Civil Rights. On this Account Slaves acquire for their Masters, and Religious for the Community of which they are Members, whatever comes to them by their Labour, Industry, or gained Good-will of others; in a Word, by all those Ways, which their Condition allows of, as not founded on a Civil Right in them, but only on their natural Power to be serviceable to, and employ'd by others who have the Rights of Citizens.——A second Sense given to the same Expression, tho' less properly, is when one is merely the *Occasion*, without any active Concurrence, of another's taking and acquiring, as if there had been a Law, which yet never was, that what a Slave might have inherited by Birth-right, should be inherited by his Master; and as Laws have been, which are still in force in some Places, that what certain Religious might and would have inherited by Birth-right, shall be inherited by their Community; in which Case it will be more properly said that Communities inherit for, or instead, and as Representatives of their Members, than those inherit or acquire for them.

This being premised, it will be easily proved that G could as little inherit or succeed for his Nepotism, as for himself; and that they could no more claim any thing on his Account, preferably to the other equidistant Kindred, than if G had died before T; in which Supposition the Nepotism owns, it could have challenged no Preference. For G could not take for his Nepotism in the first and proper Sense of the Expression, because he was no Slave, no Instrument, no Part or Appurtenance of the Nepotism; and if any thing could be taken in this Way, it must have been taken for S, towards whom he had these Respects. But G's Birth-right, which was lost by Profession, could not be a Title for him to take, even for the Benefit of S. Again, he could as little take for the Nepotism in the second Sense: Because there is neither Law nor Equity to produce for the Nepotism's taking what G might have been, but was not, intitled to; and for its standing in this Manner in the Place of G, and representing him. So far from there being any Law or Equity for such Representation, the Statute of Distributions is expressly against it, and declares that as to Succession to the personal Estates of Intestates, Representation shall go no further than to the Children of the Brothers and Sisters of the Intestates. Now neither was G Brother to T, nor the Nepotism Children to G; but both more remote from the others respectively. Wherefore, as 'tis agreed G could not first take the Property of the said Estate, and then give or any way transmit it to the Nepotism, so neither can he be said to have taken it for them, and they on his Account to have it immediately from T, any more than if G had died before T.

A second Proof of the same, and which perhaps may make more Impression, than that now brought from the received Notions and Principles of Law, offers itself from the Practice of all Countries, where

notice is taken of Religious Profession. For either the Religious are of a Kind whose Monasteries are allow'd to inherit for their Members, as of this Kind there are some in some Countries, those especially call'd *Possidents*, as *Benedictins*, *Cisterians*, &c. in Opposition to others call'd *Mendicants*: And then, whilst the Religious lives, any thing that he could have inherited goes to the Monastery, and nothing to his Heirs or Kindred. Or the Religious are of a Kind, in which the Laws of no Country allow their Houses to inherit for them, as *Capuchins*; or else of a Country in which the Houses of no kind of Religious are permitted so to inherit, as *France*, *Flanders*, &c. And in both these latter Cases it appears from the unanimous Consent of Lawyers of all Nations, that the Succession to any one, who is a kin to a Religious, goes on just in the same Manner, as if the Religious was actually dead. That so it is in relation to the every where disinherited Orders, any one knows who is acquainted with the Laws and Customs of Catholick Countries; and it may be seen very plainly in the Passages before quoted in Sections 1st and 5th from *Molina*, *Lessius* and *Sanchez* that this is always observed with relation to *strictly observing Minors* and *Jesuits*, who are now, it seems, the only Orders, in a Manner, who own themselves unable to inherit from their Members Birth-right: Tho' the latter, as has been seen, have endeavoured to get again into this Way of Inheritance, by the little Round-about of a Donation of the Expectance, previous to Profession; which the Nepotism must laugh at as well as we.

To have shewn this with Respect to Heirs of a Professed *Jesuit* is enough for my Purpose; but because it will be a great Confirmation of the same to see that this is every where observed when the Orders themselves do not inherit, I shall also shew that such is universally the Law for Countries so excluding all Religious. It will yet be sufficient, if I prove it for *France* and the *Low-Countries*, because they are the Chief of these Excluders, tho' not the only; they are our nearest Neighbours, their Customs as to this, seem to be much the same as ours were in Catholick Times, their Lawyers now speak in the same strain as ours then did, and it is easy to meet with so many of their Books, as to put the matter out of all doubt.

1. For *France* in the Front of all must be put the two most noted *Paris* Advocates, now living, *Hericourt* and *Boucher*, who were consulted on this very Case, as to the Law amongst them, and who answered, that *G having died under such a Profession as, according to their Laws, render'd him incapable of succeeding, the Estate consequently of T must be divided as if G had dy'd before him. — Par consequent les Biens de T se doivent partager de meme que si G, quoique Parent plus proche, n'avoit point ete vivant.*

To these Advocates may be join'd a *Roman* one, who was also consulted upon our same Case. He indeed favours *S* by opining for the Plea of Renunciation, as to which Part he equally impugns the Nepotism and Equidistants. But then as to the Controversy between them two, he in Conformity with *Lessius* and *Sanchez* just now cited, and with all the *S* Authors, who own that Profession amongst them extinguishes all Right of Succession in Particulars, says expressly, *that if the Inheritance be not made over and secured to S before the Profession of G, tunc habetur tanquam mortuus, et succedunt Proximiores ipsius intestato defuncti, ac si Religiosus vere esset mortuus: Then the Religious is looked upon as dead, and the nearest a-kin to the Intestate deceased succeed in the same manner, as if the Religious were really dead. And again afterwards, deferrius debet hereditas, illo veluti mortuo, successoribus ab Intestate venientibus: And the Inheritance must pass over, as if the Religious were dead, to those who by course of Law succeed to the Intestate.*

But to return to our *French* Lawyers, the same Practice with respect, universally, to all Religious, is indicated, and for the Grounds of it is alledged a Custom of Immemorial standing, by most *French* Lawyers who write upon the Subject. Thus *Guillaume Benoit*, who wrote 200 Years ago ad *Cap. Rainutius de Testam.* (see his Latin words at the end) (xii) *The same Thing*, says he, *that by a General Custom is observed in the Kingdom of France, in Relation to Cordeliers and Mendicants, is observ'd also as to any Religious of whatever other Order. For in this Kingdom it has been immemorably the Custom, that Religious never succeed to an Intestate, not to their Parents, Father, and Mother, and much less to their other Kindred.*

Rebeuf, commonly call'd *Rebuffus*, a noted Author somewhat more modern, affirms the same Thing, and gives this Reason ad *Constit. Reg. Gloss. 5. N. 21. (xiii).* *Because Religious are reputed as dead; quia Religiosi pro mortuis habentur.* And again, *ib. N. 22.* *No Profest Religious, altho' Son, or nearest e i i, can, according to the Custom of France, succeed to his Kindred, or the Monastery for him, which is against*

against the Civil Law. *Deo nobis. Cod. de Episc. & Cleric.* Some dispute whether the Custom be of Force, but the Dispute would be vain, since the Custom has been from Time out of Memory.

In as strong or stronger a manner speaks *Coquille* on the Custom of the Country of *Nevers*, of Successions, Art. 18. (xiv) *Fryars, Monks, &c. Religious of whatever Order succeed not, nor their Monasteries for them, for after their Profession they become as Civilly dead.* And Art. 19. *The Goods of those who profess in Religion, belong to their next Heirs capable of succeeding, and are entered upon just as if the said Religious had died their natural Death.*

'Twould be needless to quote any more Authors of the same Country, because they universally assure that the same is to be seen in all those Collections, which they call *Costumes*, and contain the Customary and particular Laws of the several Provinces of *France*. The same also, say they, is the Judgment of the Learned Commentators thereon.

2. For the *seventeen Provinces*, or at least, for the greatest Part of them, the Emperor *Charles the Fifth*, in an Edict directed to the supreme Tribunal for them all, establish'd at *Mechlin*, declares and decrees 21. Feb. 1528. *That no Profest Religious, nor any Monasteries, or Cloysters for them shall call themselves Heirs in a Mortuary House (Maison Mortuaire is a Term used beyond Seas for the Estate left by a deceas'd) nor shall have any Goods on the Title of Succession.*

Besides this Edict I shall only quote two of the most celebrated *Flemish* Lawyers, the one a Canonist, *Gudelinus* a Professor of *Lovain*, the other *Zypæus* a Writer upon the Civil Law of the Country. The Words of *Gudelinus de jure novissimo* L. 6. C. 10. after he had mention'd several Queries concerning Succession, are these, (xvii). "The Manners and Laws of this Country, as well as of *France*, leave no Room for a great Part of the Questions before mention'd; because by these Laws one Profest in Religion is so reputed for dead, and entirely taken out of the Number of living Men and Citizens, that afterwards he is destitute and incapable of all Right of Inheritance; no Legitimate Portion is due to him; he has no Power to make a Will, his near Kindred succeed to him (when he professes) as to an Intestate, nothing goes to the Monastery, but what he has expressly given and dedicated."

The Civil Lawyer *Zypæus* in his *Notitia Juris Belgici Tit. de Episc. et Cleric.* (xv) Has the very same sort of Expressions, so that one seems to have copied or work'd upon t'other. "One professing, says he, in Religion is amongst us so reputed for dead, that he is incapable of all Inheritance; the Legitimate Portion of Children is no more due to him, he has no Power to make a Will, his Kindred succeed to him as Intestate; nothing goes to the Monastery, but what he has expressly given or bequeathed."

Let it not be wondered if no authentick Text of the *English* Law, no Words of any Antient *English* Writer are produced, which also signify that Personal Estates in Cases exactly conformable to ours, are to be divided in the Manner I contend for. The Reason is obvious, because antiently, as before has been observed, the Personal Estates of Intestates were not here look'd upon as Inheritance, nor as devolving to one or more of the Kindred; but as wholly applicable to the payment of Debts, and works of Charity, with perhaps a particular Respect to the Kindred of the Intestates; the Person or Persons, who were to have the Administration, being to be named at the Discretion of the Ordinary, and to be accountable to him. Now, by our modern Statute of Distributions, they have put on with us, as with most, I may say all other Christian Countries, the Form of a heritable Estate. And the Way of Descent such as the *Nepotism* would have it, is sufficiently confuted, and that which I contend for, as plainly proved, as the matter will bear, by those very two Things which the *Nepotism* must have Recourse to. First, the Antient, and, if they will, the Modern Laws excluding all Religious Persons from Inheritance. Secondly by joining to these Laws the Consideration of what has, or has not been ordained by the said late Statute. If any one will have moreover special Instances of Law, and of Assertions of Lawyers, upon such a Case as ours, he must look towards such Countries, where the Profession of Religious is now frequently taken Notice of in Civil Causes, and at the same Time Personal Estates are esteemed to be heritable. And such are all Catholick Countries at this Day, where accordingly there are express Laws, and daily Instances of their Observance, by which in most Places, no Estate Real or Personal descends to a Profest Religious or his Monastery; and in no place, when it goes not to the Monastery does it descend to the Heirs of the Religious preferably to the Equi-distant Kindred of the Intestate, but in such a Case, and in every Place, if there are no direct Heirs, is equally divided amongst Collaterals in the same nearest Degree to the Deceased.

Wherefore since nothing is more conformable to the Spirit and Profession of a Religious, than a total Elongation and Abstraction from all Worldly Concerns; at which even some *Heathen* Moralists have aimed, and which may be very well described by those Words of *Horace*, *Oblitusque meorum, Obliviscendus et illis; Forgetting and Forgot by all my Friends*; generous and bountiful to them at parting, but afterwards free from all thoughts of gaining any Thing by them, or their gaining any Thing by him; which were remarkably the Behaviour and Sentiments of good Mr. G——; since both Parties agree that the Question must be decided by the Antient *English* Laws of Inheritance with regard to Religious, in Conjunction with the Statute of Distributions; since G was not so near a-kin to T, nor G's Nepotism to G, that according to the said Statute the Nepotism can be thought privileged to represent G when dead or incapable to succeed; since by a Maxim universally receiv'd in the *English* Law, at the Death of T, G was civilly dead and cut off from all Civil Rights; since no Manner of Law or Reason has been alledged by the Nepotism why G should be reputed living for inheriting and taking for them, tho' dead for the taking for his own Body: But on the contrary, the clearest Reasons have been given for rejecting this Distinction; since in those Countries which have the same Laws against Religious inheriting, as we formerly had, and have the same Notions of Personal Estates being Part of an Inheritance, as we have now, the Heirs of a Religious never come in as such, but only according to their Degree to the Intestate: And in no Country whatsoever, the Estates which do not go to a Monastery, are divided in any other Manner: From all these Considerations it must be undoubtedly concluded, that the next a-kin to G have no more Right to exclude the equi-distant Kindred of T, than S the Religious Body of G has to exclude all the Relations, both the Nepotism and Equi-distants: Which last has been fully disproved in this Supplement.

The *Nepotism* indeed has brought one Argument for its superior Title, which I did not expect; and I believe few would. But as they have insisted upon it as their Chief; and, I suppose, do so still, it will be proper to mention and say a Word to it. In reality, say they, the whole Personal Estate of T, fell, at his Death, to G, and became his Property; or, at least the Property of S, of which G and S consented that the Nepotism should have one half, and accordingly G's Will was framed. But the other Half also belongs to the Nepotism, because it is a Custom amongst us, that what comes to a Religious Order on account of one of its Members, is all or almost all to be given to the Heirs of the Religious.

This way of arguing, I cannot but think is much of a Kind with that of the Lion in the Fable, who challenged the whole Prey that he with the Help of other Beasts had run down; and the Way may be effectual, if the Equi-distants prove as tame, or weak, in Comparison, as the other Animals which hunted with the Lion. But to answer it seriously: Besides that the whole ground of this Argument, *viz.* That at the Death of T, his Personal Estate became the Property of S, has been abundantly refuted in the foregoing Sections; and that it would have been a most unparallel'd Injustice in the Nepotism [which one would not have expected to see so calmly own'd without any Hint of Reparation] to have opposed S, so violently and effectually as it did, in the Enjoyment of a Property acknowledged by it to belong to S.

1^{mo}, No Custom can be alledged in our Case, because it does not appear that ever any Instance happened among us of the like, as to that Circumstance which gives Rise to the Dispute betwixt the Nepotism and Equi-distants, *viz.* That a rich Person died intestate, his next surviving Kinsman being a Religious, who had many Heirs living in an equal Degree of Kindred; many others also surviving, tho' not so near of Kin to the Intestate as the Religious Kinsman, yet as near as the Kinsman's Heirs. And indeed if it had been the Custom for a Religious Order to make over the whole Estate in a Manner to the said Heirs, overlooking entirely the others equally a-kin to the Intestate, such a Custom, or any such Act would have been very unjust: Because, if the Religious Kinsman and his Order, were to be look'd upon for nothing, the only Thing afterwards to be considered was the Relation to the Intestate, which was the same in the Heirs to the Kinsman, and others equi-distant.

2^{do}, Very few Examples, if any one, can be alledged, of a Religious Order giving up the Whole or greatest Part of a personal Estate, much less surrendering it as a Due, when it was agreed by a Competitor, as here it is by the Nepotism, that the Whole really belonged to the Order. When indeed there has been some Dispute about this latter Point, there may be Examples of a Composition, sometimes more favourable to one side, sometimes to the other, even as to personal Effects.

3^{tio},

3th, But, again, there is not one Example, when the Competitor agreed that the Whole belonged to the Order, but, notwithstanding, had been favoured by the Gift of one Half, which is the Case, as the Nepotism must here make it, that this same Competitor should yet pretend any Custom, Title or Reason, for his having all, or almost all the rest.

4th, All the three Parties *S*, the Nepotism and Equi-distant, for reducing the Controversy into a narrower Compass have agreed, that *S* should be allowed a certain Proportion, viz. one ~~Twentieth~~ *Tenth* of a Moiety, instead of one Half of the Whole, and thereupon withdraw all further Pretensions. Therefore, whatever Demand the Nepotism might otherwise have had, upon any Share belonging to *S*, they have themselves given it up, and left this only to be determined, Which of the remaining two, when *S* is put out of the Question, has the better Title, the Nepotism to the Whole, or the Equi-distant to their proportional Shares? Of which there can be now no doubt from what has been laid open in this Appendix, as well as from the strange Argument which the Nepotism has been drove to make Use of. In a Word, the Cause of *S* has been shewn to be very bad, but that of the Nepotism, which embraces all the Absurdities of the other, and superadds many more, is proved to be much worse: Even so that could it be supposed that *S* had some Title, it would thence follow that the Nepotism has none now, to the Exclusion of the Equi-distant: Upon which it may be further remark'd, that the Nepotism have lately claim'd, and received some Share of the Personal Effects in question, upon the Title of *G*'s Will; that is, upon such a Title as gives it a bare Half. Now it is a received Rule in Law and Equity, that whoever claims and proceeds upon one Title, must not be benefited by another, which is opposite to, and would destroy the former. Wherefore the Nepotism is precluded by its own Fact from any Thing as next of Kin to *T*, (which is a Title opposite to that of the Will) and more than what the Will gives it, which is merely Half. Nay, by the same Reason, it seems to have lost all the Right it had to any Share which was only according to the Proportion of its Number to that of other Equi-distant from *T*. For it can now only pretend to avail itself of the Title of the Will, with which that of Equi-distance is incompatible: And it is plain from the whole Course of this Treatise, that it may be made apparent to any Court, Cath. or Prot. External of Publick Justice, or Internal of private Righteousness, that *G* never had any Right to the Estate in question, and consequently the Disposal which he made of it by Will, was null, and could give no real Title. Whence the Nepotism can now have no better Pretensions from the true Title it had once had from Equi-distance, than the false ones from *G* or *S*.

There now only remains one other Section to be gone through concerning a Number of Things mentioned by the Opponent, not indeed touching the Merits of the Cause, but rather touching the Merits of the different Parties, and their Behaviour in the Dispute. But there let this Section remain for many Reasons: But principally, because the treating it could contribute very little to the clearing the chief Matter in Debate, but would be very apt to widen Breaches, and make all more difficult to be closed again by the Spirit of Peace and Charity; which if we are once so happy as to see it prevail over its Opposite, *the Root of Evil*, will soon put an End to all Clamour and Complaint of Injustice and Injury, and only leave room for Congratulation upon mutual Support and Comfort.

Extract



I.

Extract from Bartolus, in Legem Finale, C. de Pactis.

ULtimo, quæro, utrum hæreditas ejus cui successurus sim ab intestato, dicatur mihi deberi spe? Hic videtur esse casus, quod in principio ibi *Spes alienæ*: Sed contrarium videtur, & est veritas, & probo; illud dicitur nobis deberi spe quod non dependet ex merâ voluntate alicujus, sed ex aliquo futuro eventu: Si tamen hæreditas ab intestato obventura sit, ex merâ voluntate defuncti pendet, quia potest testari & alium instituere, & non dicitur mihi esse spes. Hoc apparet ex alio, quia de eo quod competit spe homo potest disponere, sicut de eo quod competit re: Sed de istâ hæreditate seu spe non potest disponi. Ergo.

Nota obiter, quod ista est spes non juridica, sed quædam spes hominis vana & non attendenda: quod tene mente perpetuò.

II.

Extract from Baldus on the same Law.

DUPLEX est spes; quædam est spes que pendet ex merâ voluntate alterius, & non potest in contractum deduci; & quædam est spes quæ pendet ex futuro eventu, & non ex voluntate alterius, & ista propriè appellatur spes, & potest in contractum deduci. — Propriè *spes* appellatur illa quæ causam habet certam; at spes succedendi homini viventi non appellatur propriè spes: Et hoc facit ad præsentem quæstionem de obligante omnia bona quæ habet & sperat habere, quod intelligitur de spe causatâ de præterito, non de causandâ de futuro.

III.

Resolution, by the Doctors of Sorbonne, of the present Case, against the Pretensions of S.

C A S U S.

Sempronius tyro religiosam vitam amplexurus, omnium suorum bonorum, jurium quoque seu actionum, præsentium & futurorum voluntariam fecit oblationem, donationem vel cessionem in favorem cujusdam domus vel societatis religiosæ, quam postea ingressus est, ibique se Deo & religioni per solemnia religionis vota perpetuò mancipavit. Post quadraginta circiter a dictâ donatione annos, Titius, Sempronii frater, bonis mobilibus satis affluens, moritur absque liberis & intestatus: Ad quam proinde successionem, Sempronius, si in sæculo permanisset, proximioris parentelæ jure vocaretur. At cum ille, ratione voti sollemnis quo se, & sæculo, rebusque sæcularibus in perpetuum abdicavit, & ipsa quoque societas in qua professus est, per suas constitutiones sint juris succedendi incapaces; Titii ex aliis fratribus vel sororibus, nepotes vel forte pronepotes, ad dictam hæreditatem vocari videntur.

Reclamant

Reclamant religiosi & dicta mobilia bona sibi deberi contendunt, non quidem jure successionis, cujus se tam in communi quam in particulari, incapaces ultro fatentur; sed vi & titulo donationis, cessionis, vel renunciationis a Sempronio novitio in favorem societatis factæ.

Consanguinei, cum sint timorata conscientia, nec velint nimis in suo sensu abundare, doctorum virorum se sistunt judicio, & scire desiderant, utrum dictam hæreditatem possint adire, tutâ conscientia, & illæsâ semper, quæ debetur religioni ejusque ministris reverentiâ, quam vel minimum temerare ducunt piaculum.

DECISIO.

LECTO, & ut gravitas causæ postulat, præsentī casu mature discussio, & ventilato, censent doctores Sorbonici a Sempronio factam donationem in favorem societatis religiosæ, cujus institutum postea solemniter amplexus est, irritam esse, caducam, nulliusque roboris. Cujus decisionis, peremptoriam, utpote in ipsomet jure gentium fundatam rationem exhibet *Cabassutius, Juris Canonici Theoria & Praxis, Lib. 5. C. 3. N. 18.* his verbis conceptam, "Certum est duo exigī, ut possit quis donare quamcunque rem. Necessē primum est, ut rei donandæ habeat dominium. Secundò, ut ejusdem liberam habeat administrationem; non enim sufficit sola administratio sine dominio: Etenim tutores, curatores, procuratores, quamvis eis credita sit administratio, donare non possunt ea quæ administrant, quia carent dominio. Neque sufficit dominium sine administratione: Nam pupilli & minores, curatoribus provisi, & prodigi, quamvis rerum suarum sint domini, earumque proprietatem ac usumfructum habeant, non possunt quidquam de rebus donare quarum administratione carent." Jam vero Sempronius neque dominium, neque administrationem bonorum mobilium fratris sui adhuc viventis dici potest habuisse. Aliunde vero, quamplurimo ante fratris obitum tempore, sese per solemne paupertatis votum omni succedendi facultate spoliaverat. Restat igitur, ut circa prædicta bona, quolibet jure destitutus, eadem nequiverit in alios transmittere, juxta hanc juris canonici regulam 79am. *Nemo potest plus juris transferre in alium, quam sibi competere dignoscatur.*

Concludunt itaque doctores consulti, nihil ob stare quominus defuncti Titii consanguinei apertam ipsius hæreditatem adeant, ad quam jure gentium vocantur.

Datum in Sorbona, die 23a. Augusti, Anno Domini 1741.

DE BACQUE, MACHET, L'ADVOCAT, DE LORME.

IV.

Passage of Sanchez, in Decal. L. 7. C. 3. concerning the Subjection of Clericks to the Civil Laws of each Country, in Matters relating to the Validity of Contracts.

LEGES etenim civiles, nullam de clericis mentionem facientes, indistincte ligant clericos æque ac laicos, quando non potius in favorem, seu odium clericorum quam laicorum institutæ sunt; & licet clerici non subdantur pœnis legis civilis, subduntur tamen legibus irritantibus contractus, nisi tali modo fiant, & hoc statuit ipsa lex in hæc verba, *Omnes legibus regantur, etiamsi ad divinam domum pertineant. L. Omnes, Lib. 1. Cod. Tit. 14.*

V.

Molina de Jure & Justitia, D. 195. upon the Question, how far S is capable of inheriting.

DOmibus autem nostris professis, quæ domini bonorum mobilium capaces sunt, non solum legata sed etiam hæreditas a Christi fidelibus in eleemosynam relinqui potest. Bona tamen immobilia quorum dominium eadem domus habere non possunt, vendi debent cum primum id fieri potuerit, ut ex pretio congrua sustentatio capiatur.

Sanchez

VI.

Sanchez, *L. 7. Decal. C. 3. upon the same Question.*

NEC collegia societatis, nec societas professæ succedunt in aliqua bona suorum religiosorum. . . .
Quamvis nec societas nec collegia jus habeant nomine suorum religiosorum succedendi, ut habent cæteræ religiones, præter *Minorum*; at possunt religiosi, dum, ante vota, de eis sive donatione, sive testamento disponunt, hæredem, domum professam aut collegium instituere. Constat, quia integrum est juxta nostras constitutiones eis aliquid relinquere, nec distinguitur an titulo hæreditatis aut legati, aut donationis: Nec domus professæ reperitur hujus incapax, sed solius juris succedendi nomine suorum religiosorum.

VII.

Another Passage of Molina, Tom. 1. Disp. 139. upon the same.

TAM Professi, quam coadjutores omnes spirituales societatis, sunt eo ipso incapaces cujusunque domini, ut neque domus professæ, neque collegia, aut quisquam alius hæredes esse possunt, eorum loco; sed ad eum effectum reputantur tanquam mortui naturaliter.

VIII.

Sanchez *upon the Plea of Renunciation, L. 7. C. 9. N. 25.*

Tertio deducitur resolutio illius questionis de quâ proxime consultus sum. Quidam ex societate Jesu, juxta ipsius constitutiones, renunciavit omnibus bonis & futuræ hæreditati, in favorem ejusdem societatis aut alterius: & emisit postea in ea professionem aut vota formatorum coadjutorum: aut ante hæc emissæ obiit in societate relictis ascendentibus; An succedunt parentes? Cui questioni sic dicendum est: Si renunciatio fuit futuræ hæreditatis, casu quo est valida, cessat prorsus ejus effectus & valor statim ac ille religiosus est naturaliter mortuus, superstitie ascendente cujus hæreditati renunciavit: quod habeat tacitam conditionem ea renunciatio, si hæreditas renuncianti deferatur, ut supra diximus. Hæreditas autem non potest deferri monacho in vita parentis: quia viventis nulla est hæreditas. *L. Superstitis ff. de Acquirendâ hæreditate.* Quare necesse est ut pater in vita filii monachi decedat, ut eidem filio parentum hæreditas deferatur. Quare si filius prius obiret nil prorsus ex bonis parentis transmitteret ad alios hæredes, ut optime Gutierrez, *Q. Canon. L. 2. C. 1.* At in hoc casu non est delata. Et idem est dicendum si professionem aut vota coadjutorum formatorum in societate emittat vivo illo ascendente: quia per hæc reputatur quasi naturaliter mortuus prout de fratribus professis in ordine minorum testantur doctores, & diximus hoc *Libro supra*. Si vero renunciavit aliis etiam bonis propriis quæ hæreditario jure aut aliâ ratione sibi acquisierat, succedet ascendens ille in suam legitimam, & ei reddenda est statim ac hic mortuus est, aut emisit professionem aut dicta vota per quæ reputatur mortuus: solaque tertia bonorum pars remanebit societati aut alteri in cujus favorem renunciavit, ut constat ex dictis supra. Quod si illa bona essent adventitia & superstes esset pater, gaudebit pater usufructu illius tertiæ bonorum partis, manente proprietate apud eum, in cujus favorem fuit renunciatio: & mortuo patre redibit ad eum usufructus. Quippe non potuit præjudicare patri in hoc usufructu.

IX.

Castro Palao, *Tract.* 16. *D. 1. Puncto* 18. *De Renunciationibus, &c. factis a Novitiis Jesuiticis.*

SUPEREST autem ea gravis difficultas enodanda, an novitius, seu qui post vota biennii hæreditati paternæ renunciavit in favorem societatis, & vivo patre professionem seu vota coadjutorum formatorum in societate fecit, & post modum decessit pater, vivo filio, An societas succedere possit in illius professi hæreditatem? Negat Sanchez, *Lib. 7. Cap. 9. Num. 25.* motus ea ratione, quia si filius decedat priusquam ejus pater, hæreditas patris filio non defertur; quia non potest deferri filio vivente patre, cum viventis nulla sit hæreditas, *L. Superstitis ff. de acquirend. hæred.* & professio in societate morti naturali æquiparatur: Cum nec ipse professus, nec societas ratione illius, capax hæreditatis esse potest. Ergo. Et confirmat exemplo fratrum Minorum, quorum ratione monasterium succedere non potest: Sed æque professi societatis sunt hæreditatis incapaces. Ergo.

Sed hæc fundamenta levia sunt, ut et illa denegetur societati supradicta hæreditas; nam ut ipse Sanchez pluribus in locis testatur: Precipue *L. 7. Cap. 3. N. 68 & 78. Molin. de Hispan. Primogen. L. 1. Cap. 13. N. 9.* Mors civilis, qualis est professio, morti naturali æquiparatur, quando eundem effectum habet, secus quando diversum habere potest. At in præsentī professio in societate diversum effectum a morte naturali habere potest; quia hæc professio non exinguit jura societatis in tertium translata, sed quæ ipse professus eo tempore haberet. Deinde illa hæreditas parentes mortuo non defertur professo societatis, sicuti nec professo aliarum religionum in favorem collegii operisve pii renuncianti, sed defertur ei in cujus favorem facta est renunciatio, ob jus acquisitum per renunciationem, ut ipsemet Sanchez multis allegatis probavit, *Cap. 6. N. 2.* Ergo illa hæreditas defertur societati ob jus per renunciationem concessum a professo tempore quo valide concedere poterat. Neque obstat quod professus tempore quo moritur pater & defertur hæreditas societati, sit incapax succedendi, quominus societas succedat, quia non succedit ex jure quod eo tempore professus societati concedit, sed ex jure quod renunciando concessit. Quod professione nullatenus extinguitur, sicuti neque in religione Minorum jus succedendi quod illius ordinis religiosus ante professionem in aliquod collegium capax succedendi renunciatione transferret, extingueretur professione ipsa, sed potius firmaretur omnino, ut ipse Sanchez concedit dicto *Cap. 3. N. 79.* Convenientia autem Minorum cum professis societatis in eo sita, ut sicut Minores facta renunciatione sunt incapaces acquirendi hæreditatem, nec monasterium illorum causa, sic nec professi societatis, nec societas ratione ipsorum.

X.

Statute 31 Hen. 8. C. 6.

Concerning the Rights of Religious deraigned and not deraigned, departing and not departing.

BE it enacted by Authority of this present Parliament, that all and singular such Religious Persons, as well Men as Women professed, of what Order, Rule, or Habit soever they were, which be, or hereafter shall be put at their Liberties from the Danger, Servitude, and Condition of their Religion and Profession whereunto they were professed, by Reason of Suppression, Dissolving, Forfeiture by Attainder, Rendering, or otherwise giving up to the Hands of the King's Majesty, or any other, the same Monasteries, Abbeys, Priories, or other Religious Houses, or Places, wherein the same Religious Persons were professed, shall by Authority of this present Parliament, from and after the first Day of the same Parliament, and from and after the Time that they were or shall be put at Liberty, have free Liberty to purchase to them and their Heirs in Fee Simple, Fee Tail, for Term of Life, for Years, or at Will, Manors, Lands, Tenements, Rents, Annuities, and other Hereditaments and Things whatsoever they be, in like Mannner and

H

Form

Form as though they or any of them had never been Professed, nor entred into any such Religion. And furthermore, that the same Religious Persons and every of them, shall be made able, by Authority of this present Act, to sue, and be sued in all Manner of Actions, Plaints, and Suits, whatsoever they be, of and for any Matter or Cause growing sithence, and after the Time of their several Deraignments, or departing out of their Religion, in all Courts and Places within this Realm, as other the King's Subjects be. And furthermore, that they and every of them, shall and may from henceforth use and exercise, receive, take, have and enjoy all and every lawful Thing and Things to be grown, fall or happen to them, or any of them, after the said Deraignment, or departing out of their Religion, in as large and ample Manner, Form and Condition, as if they had never been Professed nor entered into Religion; the same Profession or Religion, or any Law, Custom or Use, within this Realm, to the contrary thereof in any wise notwithstanding.

Provided always, and be it further enacted by Authority aforesaid, That none of the same Religious Persons shall, or may at any Time hereafter be taken, deemed or judged for as Heir or Heirs, or inheritable to any Person or Persons, to any Purpose, Respect, Construction, or Intent in the Law; nor that they nor any of them, by Virtue of this Act, be received, admitted, or deemed able in the Law to demand, challenge, receive or take any Manors, Lands, Tenements or Hereditaments, or any other Thing or Things, by Reason of, or for any former Title, Right, Interest, Matter or Cause, had, made, done, or grown to any Respect or Purpose before the said several Deraignments or Departings out of their Religion: Nor that any of the said Religious Persons, being Priests, or such as have avowed Religion at one and twenty Years or above, and thereto then consented, continuing in the same any while after (not duly proving by Witness, or other lawful Means, some unlawful Coaction or Compulsion, done to them or any of them, for making any such Vow, or constraining them to remain in their Religion) be enabled by Virtue of any Words, Clause, or Sentence, before in this Act expressed, to marry, or take any Wife or Wives: But that they and every of them be clearly excluded and put from the same to all Intents and Purposes; any Thing before in this Act contained to the contrary hereof in any wise notwithstanding.

XI.

5 and 6 Edw. 6. Chap. 13.

*An Act for the Declaration of an Act made in the 31st Year of Henry 8.
touching Religious Persons.*

WHERE by an Act of Parliament made the one and thirtieth Year of the Reign of the most Noble Prince of famous Memory, King *Henry* the Eighth, for and concerning the Enablement of Professed and Religious Persons to purchase to them and to their Heirs, in Fee Simple, Fee Tail, for Term of Life, for Years, or at Will, Manors, Lands, Tenements, Rents, Annuities, and other Hereditaments and Things whatsoever: And that they and every of them should, or might from thenceforth use and exercise, receive, take, have and enjoy all and every lawful Thing and Things to be grown, fallen, or happened to them or any of them, after the same Deraignment or departing out of Religion: And in which said Act of Parliament there is a Proviso contained, That none of the same Religious Persons should or might at any time after the making of the same Act, be taken, deemed, or judged for, or as his Heir or Heirs inheritable to any Person or Persons, to any Purpose, Respect, Construction or Intent in the Law, as by the same Act, among other Things therein contained, more fully and large it may and doth appear.

And for as much as sith the Time of the making of the said Act, there hath been certain Ambiguities and Doubts grown and risen, and hereafter are like to grow and arise upon the Exposition of the said Act, Whether the said late Religious Persons, should or might be adjudged able to inherit, and to be inheritable as Heir or Heirs to any of his or their Ancestor or Ancestors; and to have and enjoy all and every Thing and Things descended, grown, fallen, or happened to them or any of them after the said Deraignment or departing out of Religion, yea, or no?

For

For the full and plain Declaration whereof, be it enacted, declared and expounded by this present Parliament, and by the Authority of the same, That all and every of the same late Religious and Professed Person and Persons, shall and may by Authority of this Act be enabled to all Intents, Constructions and Purposes, at all Time and Times hereafter, to be taken, deemed, and adjudged as Heir or Heirs, and inheritable to all and every their Ancestor or Ancestors, and to have, challenge or enjoy, receive and take all Mannors, Lands, Tenements and Hereditaments, and every other Thing and Things to them or any of them fallen, come, grown, or descended from any their Ancestors, by any manner of Ways, since the Time of their several Deraignments or departing out of their Religion, in as ample and large Manner, Form and Condition, as they had never been Professed or entred into Religion, the same Profession or Religion, or any Law, Custom or Use within this Realm, to the contrary thereof in any wise notwithstanding.

Provided always, and be it further enacted by the Authority aforesaid, that none of the said Religious Persons, shall or may by Virtue of this Act, at any Time hereafter be taken, deemed, or judged for Heir or Heirs, or inheritable to any Person or Persons, to any Constructions and Intents in the Law, by reason of any former Right, Title, Interest, Matter or Cause had, made, done, descended or grown to any Respect or Purpose, before their several Deraignments or departing out of their Religion; any thing before in this Act, or in the said former Act contained to the contrary hereof in any wise notwithstanding.

XII.

Gulielmus Benedictus, *ad Cap. Rainutius X. de Testamentis, upon the Disability of Religious to inherit.*

ET idem quod in Cordigeris & Mendicantibus, ut parentibus succedere non possint, servatur in presenti regno Franciæ ex ipsius generali consuetudine, de quolibet alio religioso etiam non mendicante, cujuscunque ordinis existat. In quo regno fuit immemorialiter observatum, quod religiosi nunquam suis ab intestato successerunt parentibus, patri nec matri, & minus cæteris eorum consanguineis, nec jura societatis profitendo retinuerunt, & per consequens eis non succedunt. — *Et paulo post*, quam (*nempe regni consuetudinem*) refert *Masuerius* optimus Arvernæ & præsentis regni Franciæ consuetudinarius — dicens, monachos haberi pro mortuis; nec per eorum professionem (quod plus est) dedicantur tacite bona quæ a successione parentum habuerant ante ingressum, vel ipsi aliter acquisiverant; quæ per professionem aliis accrescunt parentibus in gradu parentelæ proximioribus de jure succedere debentibus, (*Facit lex si quis Presbyter, C. de Episcopis & Clericis*) Si ipsi aliter prius non disposuerint, aut expresse bona illa non dedicaverint: Quia finguntur postquam professi semel fuerint, nunquam fuisse hæredes, aut bona habuisse: ut in monasterium non transeant nisi illa expresse dedicaverunt, quæ tempore ingressus & professionis eis competeabant & acquisita jam erant. — *Et inferius.* Et in hoc plus potest consuetudo quam statutum, quia consuetudo initium habet voluntarium, statutum vero coactivum.

XIII.

Rebuffus *in Proemio ad Constit. Reg. Gl. 5. N. 21. on the same Disability.*

HODIE per ingressum religionis non fit tacita bonorum dedicatio monasterio, nec succedit religioso monasterium, sed proximiores ab intestato, & ista est consuetudo generalis regni observata. — Adeo quod monasteria nulla a professo bona habent, si non ante professionem donata illis fuerint. — *Et numero 22.* Item nullus religiosus professus, quamvis filius vel proximior cognatus sit, ex consuetudine regni Franciæ potest suis succedere parentibus, vel monasterium pro eo; contra *Leg. Deo nobis, C. de Ep. & Cler.* Sunt qui disputant an valeat consuetudo; verum inquit, quia hoc est per tempus immemorabile in hoc servatum regno, ob id nunc frustra disputetur.

XIV.

Coquille Coutume de Nivernois des Successions. Art. 18. upon the same.

MOINES & religieux de quelque religion que ce soit ne succèdent point, ni le monastere pour eux. Sur quoi il dit, apres avoir compris les Jesuites entre les religieux, tous ces religieux apres la profession faite deviennent comme morts civilement, pourquoi ils ne succèdent point ; & n'est receu en France le privilege que ceux de *Citeaux* disent avoir, que le monastere auquel ils sont profés succede pour eux. — Ni les opinions des Canonistes, disants, que le monastere tien lieu de fils & autre telles. — Et Art. 19. Les biens de ceux qui font profession en religion appartiennent a ceux plus prochains heretiers habiles a succeder, & sont saisis tout ainsi que si les dits religieux estoient decedés de mort naturelle. — Sur quoi apres avoir rejetté la disposition du droit, *Auth. Ingressi. C. de Sacros. Eccles.* Comme non receue en France, il cite plusieurs autres coutumes qui disent la meme chose, & dit que posé le cas d'un testament fait avant la profession, par la profession le droit est acquis pleinement au donataire, sans pouvoir de revocation au religieux, qui, selon Coquille, ne peut faire aucun acte qui requiert le ministere du droit civil, mais seulement ce qui est d'exercice naturel ; comme par exemple, un religieux qui est nommé par un testament pour choisir un entre plusieurs pour une succession, peut choisir, car cela consiste en pur fait de volonté naturelle.

XV.

Zypæus in Notitia Juris Belgici, Tit. de Episcopis, &c.

POST citatum Caroli quinti edictum, quo regulares hæredes fieri vetuit : Siquidem, inquit, professus religionem, adeo pro mortuo est apud nos, ut omnis hæreditatis sit incapax ; legitima liberorum ei non debeatur, testamenti factionem etiam inter liberos non habeat, succedant ei propinqui ab intestato tanquam mortuo, nihil monasterio cedat nisi quod expresse donavit legavit, neque sic immobilia ex *Edictis Principum*, tantum sed pretium, si vendi ea jusserit & pretium legarit, nisi quod putant quidam ad momentum deberi immobilia, donec, viz. vendantur : Et sic accipiunt edicta.

XVI.

Petrus Gudelinus de Jure Feudorum, Par. 3. C. 5. N. 15.

SECUNDUM mores nostros monachus neque in feudis, neque in aliis bonis succedit, quinimo ei quasi civiliter mortuo propinqui succedunt.

XVII.

Idem Gudelinus de Jure Novissimo, L. 6. C. 10.

MAGNA pars superiorum quæstionum cessat moribus seu legibus harum regionum & regni Franciæ, utpote quibus is, qui professus est religionem, adeo pro mortuo, adeo ex numero civium, hominumque per omnia sublatus habetur, ut sit deinceps omnis hæreditatis expers, atque incapax, nec legitima portio liberorum ei debeatur, omnemque testamenti factionem etiam inter liberos amittat ; ac succedant ei mox propinqui ipsius ab intestato, non secus quam si e vitâ migrasset, nihilque prorsus rerum ejus, Monasterio, quod intrat, acquiratur, absque expressâ dedicatione seu donatione.

XVIII.

XVIII.

Eugenius Papa Can. Placuit. Caus. 16. q. 1.

PLACUIT communi nostro concilio, ut nullus monachorum pro lucro terreno de monasterio exire nefandissimo ausu præsumat — neque aliis quibuscumque negotiis sese implicare. Sit claustro suo contentus; quia sicut piscis sine aquâ caret vitâ, ita sine monasterio monachus. Sedeat itaque solitarius & taceat: quia mundo mortuus est, & Deo vivit.

XIX.

On a certain Pellif. quoted by the Opponent.

IN the *Discussion*, p. 3. an Author, as an Abettor of the Plea of Renunciation, was quoted in this Manner, *Pellif. Man. Regul. Tract. 2. Cap. 9. N. 11.* If the Opponent himself knew any Meaning of this Quotation, at least his Friends at *Paris* could not guess at it, as I inform'd the Reader, p. 33. But I have since heard of one *Pellizarius*, a Jesuit of *Piacenza*, who has writ a large Work in two *Folios*, under the Title of *Manuale Regularium*; and him I suppose the Opponent, or some Memorialist must have meant. Also, since this Supplement went to the Press, I have had an Extract sent me of all that this Author says any ways looking towards the Subject, in his 2d Vol. *Tract. 2. de Novitiatu, C. 9.* At first indeed I suspected he might have been a Favourer of the said Plea, and possibly have dictated to his Townsmen of *Piacenza* the Sentence so much insisted on. But I can find nothing in him that so much as tends this Way. The Difficulty he treats is of another Kind, and arises upon a Decree of the Council of *Trent, Sess. 25. C. 16. de Regul.* which forbids Religious Novices to make any Renunciation of, or contract any Obligation about their worldly Goods in favour of their Monasteries, till within two Months before their Profession, and declares all such Renunciations and Obligations made at any Time to be null, unless Profession ensue; with a Reserve nevertheless for the particular Rule of *S.* Hereupon *Pellizarius* makes the following Query, Whether, notwithstanding, the Parents, and Kindred of the Novice can bargain with the Monastery to give it a Sum of Money for the legitimate Portion of the Novice, and whatever else might devolve to the Monastery, in case the Novice should profess in it, without having disposed of his worldly Estate?

And his Answer is, That the Bargain is valid, and lawful.

Quæres 11. An stante præfato decreto concilii Tridentini, possint parentes aut fratres novitii pacisci cum monasterio, se ei duros certam summam pecuniæ pro legitimâ, & omni eo quod ratione dicti novitii ad ipsum monasterium spectare posset; in casu quo novitius ibi profiteatur, nullâ suorum bonorum dispositione factâ? — Respondeo ejusmodi contractum videri & validum, & licitum.

Now it is manifest nothing of this makes to the Case in Hand; because, by a Rule of *S* often mentioned by the Opponent, nothing devolves to it of what belonged to the Religious before his Profession, but what he has expressly disposed of in its Favour. And moreover he is pretended in our Case so to have disposed of the Estate in Question, altho' it never belong'd to him, and never would.

It appears therefore, that of all the Writers whom the Opponent has quoted as Abettors of his Plea, and of whom I have been able to get a Sight, or Account, only *Castro Palao* is really a Maintainer thereof; and that I have had and given an Account of all quoted, excepting two, *Tancred* and *Tamburin*. *Tancred*, in all Appearance, is a meer Name, without any Person to answer it. *Tamburin* I have often heard of, whose Name is so much up amongst the loose Casuists, that I should not wonder, if the Opponent had him here on his Side. But of this I cannot charge him, as it has not fallen in my Way to be appriz'd of his Sentiments. Upon the Whole 'tis worthy of Remark, that in p. 3.

of

of *Discussion*, where the Opponent musters up the Authorities of Divines for his Plea of Renunciation, he mentions, besides *Tamburin*, seven more, *Sanchez*, *Molina*, *Suarez*, *De Lugo*, *Pellis*, *Tancred* and *Castro Palao*, who are all Jesuits, or supposed to be such: The first of which nevertheless, *Sanchez*, declares expressly against the said Plea; the next *Molina*, and then *Lugo*, together with *Lessius* and *Layman*, reject it equivalently; *Suarez* and *Pellis* say nothing to the Question; *Tancred* no News can be heard of; and the only one for it, and who is to give a Sanction to this Extravagancy of Injustice, is *Castro Palao*.

May 25, 1745.

ERRATA.

Page 3. line 7. after *Religious House* called S, add, and never departed from his Profession. P. 4. l. 23. after *Badness* of his Cause, add, which likewise will be here made out in the Theological Way, in which the Matter has hitherto been treated by these Two. P. 32. l. 10. read betwixt Profession and natural Death.



